Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

EYAK NATIVE VILLAGE, *et al.*,
Petitioners,

v.

EXXON CORPORATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the filing of consolidated papers in complex class action litigation, in implementation of a state court's order consolidating separate cases for pretrial purposes, makes *all* signatory plaintiffs susceptible to derivative removal to federal court under 28 U.S.C. § 1441(c), as plaintiffs "joined" in the same "entire case", if *any one* of them subsequently introduces a federal question unique to himself.

2. Whether a federal question is introduced into a case otherwise involving only issues of state law when a plaintiff argues that his claim is not barred by *res judicata* arising from an intervening consent decree in separate federal court litigation between the defendant and governmental entities.

LIST OF PARTIES

The Petitioners are the following persons and corporations: Eyak Native Village; Sea Hawk Seafoods, Inc.; Hunter Cranz; Richard Feenstra; Prince William Sound Aquaculture Corp.; Elmer J. Cheshier; Samish Marine, Inc.; Michael McAllister; Charlotte Yoakum; Lee Judson Lantz Hughes; Grant C. Baker; Dennis Bishop; Native Village of Chenega Bay; Native Village of Port Graham; Native Village of English Bay; Mount Marathon Native Association, Inc.; Valdez Native Association, Inc.; Agnes Nichols; Gilbert Olsen; Henry Makarka; John M. Totemoff; Maggie A. Totemoff; Walter Maganack, Sr.; Walter Maganack, Jr.; Juanita Melsheimer; Gerald E. Thorne; Kent Herschleb; John Herschleb; Anne Herschleb; Tom Copeland; Hugh R. Wisner; Larry L. Dooley; Old Harbor Native Corporation; Marc Van Driessche; Ed Clarke; The Alaska Sea Otter Commission; The Shoonaq' Tribe of Kodiak; The Native Village of Larsen Bay; The Native Village of Old Harbor; The Native Village of Karluk; The Native Village of Port Lions; The Native Village of Akhiok; The Native Village of Ouzinkie; Ronny Lind; Allen Panamaroff; David Eluska, Sr.; Teshia Harris; Philip G. McCrudden; Keith H. Gordaoff; George A. Gordaoff; The Karluk Lodge, Inc.; Kodiak Salmon Packers, Inc.; Randall P. Babich; Michael McLenaghan; Floyd Hutchens; Kenneth Moore; Michelle Hahn O'Leary; A. Douglas Pedersen; Timberline, Inc.; Frank Michael Carlson; Elenore McMullen; Bradford Chisolm; David Clarke; Kim Ewers; David Horne; Michael Owecke; Guy Piercey; Malcolm Stewart; Kodiak Marine; Joseph Klouda; Bill Simmons; Zenas Zeine; Dan Calhoun; Albert Carroll; Edward Gregorieff; T. Scott McAllister; Northwest Bait Supply Company; Gerald L. Thorne; Ina Thorne.

The principal respondents are Exxon Corporation and its wholly owned subsidiary Exxon Shipping Company (collectively "Exxon"). Alyeska Pipeline Service Company and its owners Amerada Hess Pipeline Corporation;

Arco Transportation Alaska, Inc.; Exxon Pipeline Company; Mobil Alaska Pipeline Company; BP Pipelines (Alaska), Inc.; Phillips Alaska Pipeline Corporation; and Unocal Pipeline Company, as well as its President George M. Nelson, were also defendants in the district court and parties in the Court of Appeals. These Alyeska defendants entered into a settlement with the plaintiffs and have not been active in subsequent proceedings, although they remain as parties pending final disposition of the settlement.

RULE 29.1 STATEMENT

Those Petitioners which are corporations have no parent companies or subsidiaries other than wholly owned subsidiaries.

PARTIES IN THE COURT OF APPEALS

In addition to the Petitioners and Respondents listed above, the other plaintiffs listed in Appendix E (separately bound) were also parties in the Court of Appeals. Those other plaintiffs are not petitioners because the Court of Appeals held that their cases had been improperly removed and should be remanded for reasons unrelated to the issues involved in this Petition.*

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* Exxon has filed a certiorari petition (No. 94-385) seeking review of the Court of Appeals decision insofar as it directed remand of three cases involving a small minority of these other plaintiffs. As our brief in opposition to Exxon's petition shows (and Exxon's petition agrees), the questions presented there and the district court orders involved there are entirely separate from those here.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners listed at page ii, *supra*—who are plaintiffs in the Alaska *EXXON VALDEZ* oil spill litigation, many of them serving as representatives of certified plaintiff classes—petition for a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the Ninth Circuit in *Eyak Native Village, et al.* v. *Exxon Corporation, et al.* (No. 93-35274) which affirmed the District Court's Order No. 80 denying remand of Petitioners' cases to the Superior Court of the State of Alaska following removal by respondents in reliance upon 28 U.S.C. § 1441(c).

OPINIONS BELOW

The opinion of the Court of Appeals (A. 1a-22a) is reported at 25 F.3d 773. The District Court order the affirmance of which is the subject of this Petition (Order No. 80, A. 23a-40a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1994. Petitioners' timely petition for rehearing of the Court of Appeals' affirmance of Order No. 80 was denied on July 13, 1994 (A. 41a-42a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The provisions of the Judicial Code relating to removal of cases from state courts (28 U.S.C. § 1441 *et seq.*) provide as follows in pertinent part:

> § 1441. Actions removable generally
>
> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
>
> (c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

STATEMENT

Following the catastrophic March 1989 spill of crude oil from the supertanker EXXON VALDEZ into Prince William Sound, Alaska, a large number of damage suits were filed by individuals and businesses claiming injury from the resulting destruction and degradation of fish and other resources in the surrounding waters. Some cases were filed in federal court, seeking relief primarily under maritime law. Others were filed in the Superior Court for the State of Alaska, seeking relief primarily under the Alaska Environmental Conservation Act, 46 A.S. § 46.03.822 *et seq.*, which provides strict liability for broad categories of damages caused by oil spills in Alaska's territorial waters, and also under Alaska's common law of torts.

Petitioners are plaintiffs who filed fifteen separate cases in the Alaska Superior Court at the outset of the litigation, which cases were subsequently removed by the Exxon defendants. These separate state court cases had in common the fact that, unlike the large bulk of other individual cases, they were filed as class actions. Petitioners' complaints proposed variously defined classes including Alaska natives, commercial fishermen, processors and distributors of seafood, other businesses impaired by the oil spill, and landowners.[1]

Early in the litigation, the Superior Court entered an order consolidating all *EXXON VALDEZ* cases before it "for pre-trial purposes". Pretrial Order No. 1 (June 8, 1989). Following the pattern recommended in the *Manual for Complex Litigation, Second* (§ 41.3), this consolidation order included a proviso that "[n]o action taken hereunder shall have the effect of making any person, corporation, or other entity a party to any action in which he or it has not been named, served, or added as such in accordance with the Alaska Rules of Civil Proce-

[1] Rule 23 of the Alaska Rules of Civil Procedure is substantially identical to Rule 23 of the Federal Rules of Civil Procedure.

dures." *Inter alia*, Pretrial Order No. 1 directed the parties to "familiarize themselves with the *Manual for Complex Litigation, Second*, and be prepared . . . to suggest procedures that will facilitate the expeditious, economical, and just resolution of this litigation."

In the interest of uniformly structuring the proposed classes and streamlining the claims in the consolidated proceedings, Petitioners (with the exception of plaintiffs in the *Wisner* case, who continued under their separate complaint seeking to represent a class of landowners) proceeded to file, in July 1989, a common Amended and Consolidated Class Action Complaint. This Amended and Consolidated Class Action Complaint also covered another case seeking environmental relief on behalf of a proposed class of recreational users (*Alaska Sportfishing Ass'n*). Pursuant to the provisions of Pretrial Order No. 1 governing documents applicable to multiple cases, the caption of the Amended and Consolidated Class Action Complaint listed each of the fifteen cases to which it related by number and short name, as did Exxon's answer (and indeed its later removal petition).

The same Petitioners and the *Alaska Sportfishing Ass'n* plaintiffs again cooperated to file an omnibus class action motion in September 1989. The *Wisner* Petitioners joined that motion at the reply stage in April 1990. As requested by the omnibus motion, the Superior Court certified four plaintiff classes represented by Petitioners (Alaska Native, Commercial Fishing, Area Business and Property Owner). It declined, however, to certify the "Use and Enjoyment" class proposed at the behest of the *Alaska Sportfishing Ass'n* plaintiffs.[2]

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[2] The *Alaska Sportfishing Ass'n* claims were also removed, but those plaintiffs were not appellants below. Their claims were dismissed on the merits after removal and that dismissal was affirmed in *Alaska Sportfishing Ass'n v. Exxon Corp.*, 1994 WL 450327 (9th Cir. Aug. 23, 1994) (App. D, A. 43a-51a, *infra*).

The omnibus class motion also proposed a municipal government class, which the Superior Court declined to certify. That Court

Except for the fact that classes were not certified by the District Court,[3] the state and federal consolidated actions proceeded on generally parallel tracks for some two and one-half years. Substantively, however, the Superior Court's rulings were more favorable to plaintiffs' claims than those of the District Court.[4] In addition, on November 9, 1991, the Superior Court entered an order scheduling a jury trial of all common issues relating to liability and punitive damages for April 1993, while at that time it appeared that any District Court trial would come considerably later.

Exxon filed the removal notice that is the subject of this Petition shortly thereafter, on November 20, 1991. The theory under which it removed Petitioners' cases—

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additionally certified a class of cannery and processor workers which was requested by a separate motion. Neither municipal governments nor cannery or processor workers are involved here. Petitioners never pursued certification of the processor-distributor class named in the Amended and Consolidated Class Action Complaint.

[3] In March 1994 (long after removal of the class actions certified by the Superior Court and pursuant to a stipulation agreed to by Exxon) the District Court certified three classes, consisting of commercial fishermen, Alaska natives participating in subsistence fishing and hunting in the affected areas, and owners of real property in those areas. The stipulation (applicable in whatever court might be the ultimate destination of the removed cases) also provided for decertification of the Area Business class. Those Petitioners who do not belong to the classes ultimately approved by the District Court have proceeded as individual plaintiffs, along with numerous plaintiffs who have opted out of the classes.

[4] For example, the Superior Court ruled that Exxon was strictly liable under the Alaska Environmental Conservation Act for all damages resulting from the spill, and rejected defendants' argument that *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), precluded all damages for economic injury (other than commercial fishermen's losses) not resulting from direct physical impact by the spilled oil. In contrast, the District Court accepted this argument and thereby drastically reduced the compensatory damages potentially available in that court.

now endorsed by the Court of Appeals—proceeded in two steps:

First, Exxon contended that a federal question was introduced into the *Alaska Sportfishing Ass'n* claims in October 1991 when those plaintiffs (together with the environmental organization plaintiffs which had filed the separate *National Wildlife Federation* complaint) submitted a reply brief in support of their new motion for certification of a "conservation trust class." The alleged federal question was the contention by these "trust class plaintiffs" that their claims were not foreclosed by an intervening District Court consent judgment settling environmental claims brought against Exxon by the United States and the State of Alaska.

Second, Exxon contended that Petitioners' claims were derivatively removable under 28 U.S.C. § 1441(c) as (in the language of that subsection) "separate and independent claims" allegedly "joined with" the trust class plaintiffs' claims and thus removable as part of the same "entire case." Exxon has never contended that anything in Petitioners' claims themselves has raised any federal question that could give the District Court independent jurisdiction over them, or that Petitioners had any involvement in the "conservation trust class" motion.[5]

The District Court's Order No. 80 denied Petitioners' timely motion to remand their cases (*i.e.*, all cases included in the Amended and Consolidated Class Action Complaint except *Alaska Sportfishing Ass'n*, plus the *Wisner* case) to Superior Court. After the District Court certified Order No. 80 for interlocutory appeal under 28 U.S.C. § 1292(b), the Court of Appeals granted leave to appeal. The Court of Appeals affirmed Order

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[5] The reply brief which Exxon claimed raised a federal question specified in its caption, pursuant to the Superior Court's Pretrial Order No. 1, that "This Document Relates to: Cases Nos. 89-6957 [*National Wildlife Federation*] and 89-5188 [*Alaska Sportfishing Ass'n*]," and was signed only by counsel in those cases.

No. 80, and then denied Petitioners' petition for rehearing and suggestion for rehearing en banc.[6]

The Court of Appeals' opinion concluded that Petitioners' claims were properly removed under § 1441(c),

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[6] As previously noted, the same opinion reversed separate District Court orders denying remand of numerous other cases which had been removed on entirely different grounds, and Exxon has petitioned for certiorari as to three of those cases. The ground for reversal as to those other cases was that the removal notices were untimely, and there is no dispute that the issues raised by that certiorari petition and this one are entirely unrelated.

Most of the issues raised by the removed cases and those initially filed in federal court have now been tried to a jury, which has recently rendered verdicts awarding punitive damages and limited compensatory damages on those claims of plaintiffs and class members which have not previously been rejected by the District Court. Exxon has filed a number of post-trial motions which are pending.

A reversal of Order No. 80 would not undo the resolutions reached in these proceedings in any substantial respect. The punitive damage judgment is entered on behalf of a mandatory non-opt-out class certified under Rule 23(b)(1) with class representatives who sued initially in federal court; the District Court's jurisdiction as to punitive damages is not, therefore, dependent upon any removal. As to compensatory damages, all plaintiffs and class representatives have entered into a stipulation with Exxon, "so ordered" by the District Court, that the jury's verdict on the issues presented to it will be binding (subject to post-trial motions and appeal) regardless of the outcome of the removal disputes, so that a reversal would not require any retrial in state court. The effect of the remands sought by this Petition would, therefore, be to permit Petitioners to pursue claims that they have not been allowed to pursue in federal court. For some (such as processors and other businesses), this would amount to revival of claims that have been dismissed based on *Robins Dry Dock & Repair Co. v. Flint, supra.* For others, it would mean that they could pursue additional damage claims rejected by the District Court as a matter of law to the extent the Superior Court would entertain them; such claims include fishermen's claims for price effects upon Alaska fish outside the immediate area polluted by the oil spill and for the diminished values of their permits and equipment, natives' claims for disruption of their traditional subsistence culture, and landowners' claims for impairment of littoral rights and diminution in the value of property not actually on the market for sale.

notwithstanding the absence of any independent basis for federal jurisdiction over them, because they were "joined" in the same "case" as the supposedly federal claims later asserted by the *Alaska Sportfishing Ass'n* plaintiffs. The Court held that such "joinder" of Petitioners' separate cases had occurred when all except the *Wisner* case were included in the Amended and Consolidated Class Action Complaint, and when all Petitioners (including the *Wisner* plaintiffs) collectively presented their omnibus proposal for certification of classes including the aborted "Use and Enjoyment" class of which only *Alaska Sportfishing Ass'n* plaintiffs (and no Petitioner) were proposed as representatives. The Court's rationale was as follows:

> "The Consolidated Complaint . . . sought to create from the 15 separate class actions a consolidation into 5 new proposed classes. . . . As the district court observed, 'Fifteen separate class actions could not be transformed into 5 proposed classes without the claims being joined.' The same principle applies to the plaintiffs in the *Wisner* case, who later joined in the consolidated action." (A. 14a-15a)

In support of its threshold determination that the *Alaska Sportfishing Ass'n* plaintiffs' conservation trust claim was removable, the Court of Appeals asserted that a federal question arose when, "[a]nticipating the defense of *res judicata*, the trust plaintiffs argued [in their October 1991 reply brief] that the consent judgment was not binding because the State was not fully representative of all interests" and that "they were entitled to sue as trustees for public users of the natural resources as a supplement to the damages secured by the State and the United States . . ." (A. 6a). The presentation of this argument, it held, converted the state-law conservation trust claim into "an independent action in equity to obtain relief from [the federal court consent] judgment" (A. 8a) and thereby "recharacterized [the trust plaintiffs'] claims as federal claims" (A. 10a).

"Thus, the district court correctly concluded that the trust plaintiffs were seeking to set aside the provision of the consent decree that provided it was in full payment for the damages to the public's natural resources. . . .

"Although the original complaint did not set forth a removable claim, the reply brief did. . . .

"The trust plaintiffs would have to be relieved of the consent decree in order to obtain damages beyond those awarded in the consent decree, because it was stated to be full compensation for the public's claim for natural resources damages." (A. 12a-13a)[7]

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[7] The Court acknowledged, but gave no significance to, the explicit statement in the trust plaintiffs' reply brief that "they were not challenging the government settlement, but were seeking only supplementary and non-conflicting recovery through the proposed trust fund" (A. 6a-7a).

In affirming the subsequent dismissal of the trust plaintiffs' claims, another panel of the Ninth Circuit held that "Because plaintiffs were in privity with these governments [of Alaska and the United States], as members of the public, and because plaintiffs seek to recover for the very same damages the governments have recovered for, plaintiffs' claims are barred by *res judicata*." *Alaska Sportfishing Ass'n v. Exxon Corp., supra* (A. 51a).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD CORRECT THE COURT OF APPEALS' HOLDING, INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS, THAT THE FILING OF CONSOLIDATED PAPERS IN COMPLEX CLASS ACTION LITIGATION SUBJECTS THE PARTICIPANTS TO THE SAME CONSEQUENCES AS JOINDER OF THEIR CLAIMS INTO A SINGLE CASE.

A. This Question Is An Important One For The Interpretation Of The Removal Statute As It Applies To Complex Litigation In Our Federal System.

The removal of Petitioners' claims, as affirmed below, is premised upon an interpretation of 28 U.S.C. § 1441(c) that treats sixteen separate state court cases as "joined" into a single "entire case" simply because plaintiffs' counsel worked together to implement the state court's pretrial consolidation of the cases by filing a single Amended and Consolidated Class Action Complaint and a single omnibus class action motion proposing six different classes.[8] This, notwithstanding that (1) both the Amended and Consolidated Class Action Complaint and the class action motion papers meticulously reserved the separate identities of the cases, as originally filed, by listing them in the captions; (2) neither Petitioners nor the *Alaska Sportfishing Ass'n* "trust class plaintiffs" ever took any action to dismiss the separate cases they had filed; (3) the reply brief that was found to introduce a federal question was submitted only by counsel for the trust class plaintiffs and its caption referred only to their separate cases; (4) no Petitioner was ever designated as a representative or member of either the proposed "Use and Enjoyment" class or

[8] Indeed, the *Wisner* petitioners did not even participate in the Amended and Consolidated Class Action Complaint. Their "joinder" rests solely on the fact that they signed on to the omnibus class action proposal at the reply brief stage.

the proposed "conservation trust" class on whose behalf that reply brief was submitted; and (5) the state court had expressly provided that no action under its consolidation order would effect any merger of cases.

Thus, the Court of Appeals found joinder into a single case despite counsel's having done everything they could to preserve the separate identities of their cases while achieving the simplification and streamlining that were possible only through a consolidated statement of claims and a consolidated proposal of a class action structure.

The Court of Appeals' holding raises a new and powerful barrier to cooperative efforts to manage complex multiparty litigation. The need for such affirmative initiatives by counsel is universally recognized. *See, e.g., Manual for Complex Litigation, Second,* Preface and Dedication; *id.* §§ 20.21, 20.22. If, however, such initiatives have the effect of merging separate cases into one and thereby subjecting each cooperating plaintiff to serious jeopardy from actions that any other cooperating plaintiff might take in pursuit of his individual interests, they will cease. Careful counsel will simply avoid the risks of any such coordination of claims and class proposals.

The application of § 1441(c) below—for which there is no precedent whatsoever—is a far cry from the normal whole-case removal situation, where a plaintiff has knowingly chosen to assert a number of claims one of which raises a federal question, or has knowingly chosen joinder with another plaintiff who at the time of joinder was alleging federal claims. Under the Court of Appeals' interpretation of § 1441(c), a plaintiff who assists in pretrial coordination risks losing his choice of forum because of unforeseeable future actions by any one of numerous other plaintiffs with whom he has cooperated only as a matter of necessity, over whom he has no control, and who may well have conflicting interests.

This Court has been consistently vigilant to correct undue expansions of federal court jurisdiction under the removal statute. *E.g., Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (" 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' " [Citations omitted.]); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 8, 16 (1951) (interpreting § 1441(c) strictly in another respect); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987); *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989). The Court of Appeals' holding that the District Court acquired jurisdiction by reason of nothing more than case-management procedures in state court is at odds with this important principle of federalism, and should similarly be corrected.

B. The Court Of Appeals Has Answered This Question In A Way That Is Inconsistent With the Decisions Of This Court And Other Courts Of Appeals.

The Court of Appeals' interpretation of the terms "join" and "case" as used in § 1441(c) does violence to their plain meaning in the context of the Federal Rules of Civil Procedure. "Consolidation" and "joinder" are not the same thing; a "consolidated" complaint expressly captioned in fifteen separate actions is a very different thing from a unitary complaint in which multiple plaintiffs are joined within the meaning of Rule 19 or 20.[9] There is no basis for the theory—upon which the Court of Appeals principally relied (A. 15a, 17a)—that joinder

[9] Like many modern state rules of procedure, the Alaska Civil Rules are substantially identical to the Federal Civil Rules on joinder and consolidation.

automatically resulted from the proposal and certification of classes with representatives from multiple cases. Nothing in the Rules suggests that parties who sign a collective motion thereby fuse their cases into one. Indeed, any notion that proceedings under Rule 23 could create removal jurisdiction over Petitioners' claims is negated by the caveats of the Rules Enabling Act, 28 U.S.C. § 2072(b), and Rule 82 that the Rules shall not be construed to extend the jurisdiction of the federal courts.[10]

Under the predecessor of the consolidation Rule (Rule 42(a)), this Court has clearly articulated (in a different but related context) the distinction that the Court of Appeals ignored, holding that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496-97 (1933). Other Courts of Appeals have made the same distinction under the Federal Rules. *E.g., Bradgate Associates, Inc. v. Fellows, Read & Associates, Inc.*, 999 F.2d 745, 750 (3d Cir. 1993) ("[W]hile consolidated cases may be treated as one lawsuit in order to conserve judicial resources, the procedure should not impose the heavy toll of a diminution of any party's rights."); *Stacy v. Charles J. Rogers, Inc.*, 756 F.2d 440, 442 (6th Cir. 1985); *In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439 (1st Cir. 1972).

> " 'One or many or all of the phases of the several actions may be merged. But merger is never so com-

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[10] If the Court of Appeals' theory that " '[f]ifteen separate class actions could not be transformed into 5 proposed classes without the claims being joined' " were correct, Petitioners would inexorably have been "joined" into a single "case" by the Superior Court's class certification order even if they had not filed an Amended and Consolidated Class Action Complaint and even if they had filed sixteen class action motions rather than one.

> plete even in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately.' "

Id. at 441, quoting Moore, *Federal Practice* ¶ 42.02 (2d ed. 1971). There is plainly a conflict in principle between these decisions and the decision below.

More specifically in the class action context, the Court of Appeals for the Second Circuit has held that the filing of a single consolidated complaint superseding disparate class action complaints does not alter the individual rights of the participants because "[i]t is axiomatic that consolidation is a procedural device designed to promote judicial economy and that consolidation cannot effect a physical merger of the actions or the defenses of the separate parties." *Katz v. Realty Equities Corp.*, 521 F.2d 1354, 1358 (2d Cir. 1975) (affirming order requiring consolidated complaint to be filed).[11] While the Court of Appeals correctly noted that the consolidated filing in *Katz* was mandated by the trial court rather than volunteered as here (A. 18a), it did not explain why that distinction should alter the nature and effect of a consolidated filing once it has been made. Moreover, such a distinction would have the perverse effect of limiting collective actions by plaintiffs to those specifically ordered by the trial court *sua sponte* and discouraging any constructive initiatives by plaintiffs' counsel.[12]

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[11] To the same effect, *see also In re Wirebound Boxes Antitrust Litigation*, 128 F.R.D. 262, 264 (D. Minn. 1989); *In re Equity Funding Corp. Securities Litigation*, 416 F. Supp. 161, 176-77 & n.12 (C.D. Cal. 1976).

[12] The Court of Appeals' statement that *Katz* did not "involve[] the certification of classes that drew plaintiffs from a variety of other class actions" (A. 15a-16a) appears unfounded. The *Katz* opinion noted that there were 17 actions (521 F.2d at 1355-56) with 21 plaintiffs representing 5 classes (*id.* at 1357).

II. THIS COURT SHOULD GRANT CERTIORARI TO MAINTAIN THE INTEGRITY OF THE PRINCIPLE THAT REMOVAL CANNOT BE PREMISED ON THE ASSERTION OF A FEDERAL-LAW DEFENSE, INCLUDING ONE OF RES JUDICATA, OR UPON A PLAINTIFF'S RESPONSE TO OR ANTICIPATION OF SUCH A DEFENSE.

A. In Upholding The Removability Of The "Trust Class Plaintiffs'" Claims (The Premise For Derivative Removal Of Petitioners' Claims) The Court Of Appeals' Decision Conflicts With Applicable Decisions Of This Court And Calls For Supervisory Correction.

The Court of Appeals acknowledged (1) that the trust class plaintiffs' claim for establishment of a "conservation trust" was based exclusively on state law and therefore "did not set forth a removable claim" (A. 12a), and (2) that the trust class plaintiffs were "[a]nticipating the defense of *res judicata*" when their reply brief presented the contentions about the governmental consent decree which were the sole trigger for Exxon's removal notices (A. 6a). That should have been the end of the matter, as this Court held in reversing the removal in *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 840-41 (1989):

> "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint' rule. '[W]hether a case is one arising under [federal law], in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill of declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.'" (Citations omitted; elision and brackets in original.)

As the cases cited in *Oklahoma Tax Commission* attest, that has been the law since at least the early years of this century.

The Court of Appeals' characterization of the trust class plaintiffs' contentions as tantamount to an independent action for relief from the governmental judgment (A. 8a-10a) is just the kind of evasion of this limitation upon removal that this Court has hastened to correct when it has emerged in other forms. Whether the conservation trust claim was barred by the governmental consent decree, or not, was purely and simply a question whether that decree was *res judicata*. The Court of Appeals acknowledged that below (A. 6a), and made it absolutely clear in its subsequent opinion dismissing the trust class plaintiffs' cases on this ground:

> "Because plaintiffs were in privity with these governments, as members of the public, and because plaintiffs seek to recover for the very same damages the governments have recovered for, plaintiffs' claims are barred by *res judicata*."

Alaska Sportfishing Ass'n v. Exxon Corp. (A. 51a).[13] *Res judicata* is, of course, a classic affirmative defense and is listed as such in Fed. R. Civ. P. 8(c). [14]

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[13] Indeed, the opinion below acknowledged that "[t]he trust plaintiffs' reply brief . . . stated . . . that they were not challenging the government settlement, but were seeking only supplementary and non-conflicting recovery through the proposed trust fund" (A. 6a-7a).

[14] The Court of Appeals correctly avoided any reliance on Exxon's argument that removal could be justified by attempting to fit the trust class plaintiffs' reply brief into the "artful pleading" doctrine delineated in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981). That narrow doctrine permits removal based on the preclusive effect of prior federal litigation only in a situation where, as in *Moitie* itself, a state court plaintiff is found guilty of attempting to evade the consequences of having sued and lost in federal court by repleading an identical claim dressed up in state-law terminology. *See, e.g., Ultramar America, Ltd. v. Dwelle*, 900 F.2d 1412, 1417 (9th Cir. 1990). If there were any issue as to expansion of the "artful pleading" doctrine to a situation like that here, that issue would be one eminently deserving of this Court's consideration on a writ of certiorari.

Here, as in *Oklahoma Tax Commission* and its predecessors, the Court should act to head off the inroad that the Court of Appeals decision would make upon the "well pleaded complaint" rule that is central to removal jurisprudence in our federal system.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-35274

D.C. No. CV-89-00095-HRH

EYAK NATIVE VILLAGE, *et al.*,
Plaintiffs-Appellants,

v.

EXXON CORPORATION, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, Presiding

Argued and Submitted
July 13, 1993—San Francisco, California

Filed May 27, 1994

Before: Herbert Y. C. Choy, Procter Hug, Jr., and
Edward Leavy, Circuit Judges

OPINION

HUG, Circuit Judge:

This case requires us to determine whether the district court's denial of motions to remand cases removed from an Alaska state court was error. This interlocutory appeal concerns the removal of over 160 separate cases brought in the Superior Court of the State of Alaska. Plaintiffs sued Exxon and Alyeska under Alaska law for the injuries caused by the *Exxon Valdez* oil spill.[1] The cases proceeded in state court for several years before defendants Exxon and Alyeska removed the cases to district court on the basis that federal questions had arisen justifying removal. The issue on appeal is whether removal to federal court was appropriate.

The appeal is from five district court orders (Nos. 80, 83, 91, 92, 108) denying motions to remand to the Superior Court of the State of Alaska a number of different removed cases. We granted permission to appeal pursuant to 28 U.S.C. § 1292(b), and we now affirm in part and reverse in part.

I.

GENERAL BACKGROUND OF LITIGATION

Hundreds of cases were filed in both the Alaska Superior Court and the federal district court seeking relief from Exxon and Alyeska for various injuries caused by the March 1989 *Exxon Valdez* oil spill. Exxon was sued as the owner and operator of the tanker that went off course and ran aground (Exxon Shipping Co.) and as the owner of the more than 11 million gallons of oil that spilled

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[1] "Exxon" refers to Exxon Corporation, Exxon Shipping Company, Exxon Transportation Company, and individual defendants who are current or former Exxon employees. "Alyeska" refers to Alyeska Pipeline Service Company, the six oil companies which, in addition to Exxon, are its co-owners, and individual defendants employed by Alyeska.

(Exxon Corp.) for failure to perform its statutory and common law responsibilities in connection with the spillage and the clean up. The Alyeska defendants are pipeline companies that own and operate the Trans-Alaska Pipeline System and the terminal at which the *Exxon Valdez* had been loaded.

The plaintiffs sue on their own behalf and in some cases as representatives of plaintiff classes, including commercial fishermen whose fishing grounds were damaged by the oil, Alaska Natives who subsist on various fish and other resources, processors of fish harvested from the affected area, employees of processors, area businesses and land owners, and other injured persons. The federal court complaints seek relief under maritime law and the remedial provisions of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(c) ("TAPAA"). The complaints filed in state court seek relief under the Alaska Environmental Conservation Act, 46 Alaska Stat. §§ 46.03.822, *et seq.*, which establishes strict liability for oil spills, and also under Alaska's tort law.

The federal court cases were consolidated for pretrial purposes before District Judge H. Russel Holland and the state court cases were consolidated before Judge Brian Shortell of the Third Judicial District of the Alaska Superior Court. The state and federal courts cooperated in some stages of the proceedings. They selected the same lead and liaison counsel and a common executive committee for the plaintiffs, appointed a single discovery master, and jointly heard motions.

The State of Alaska and the United States Government also brought actions against the defendants on behalf of the public for injury to natural resources pursuant to the provisions of the Clean Water Act, 33 U.S.C. § 1321(f), and other federal environmental legislation. On October 8, 1991, the state and federal governments' claims against Exxon Corp. and Exxon Shipping Co. were resolved by

entry of an Agreement and Consent Decree in the district court. The Agreement and Consent Decree provided for Exxon Corporation and Exxon Shipping to pay the governments at least nine hundred million dollars ($900,000,000) to restore and rehabilitate the damaged natural resources in exchange for a release of all claims, including natural resources claims on behalf of the public. There is also a provision for an additional one hundred million dollars ($100,000,000) for unexpected damages under certain conditions.

Four environmental organizations sought to recover damages from Exxon to contribute to a conservation trust fund for the benefit of the general public to restore the environment and natural resources damaged by the oil spill. We have designated these plaintiffs as the "trust plaintiffs." On November 21, 1991, the Exxon defendants removed to federal court all cases related to the environmental organizations' cases. The Exxon removals are based on the ground that the claims of the trust plaintiffs raised a federal question because the trust plaintiffs continued to pursue their claims for natural resources damages after the federal consent decree was entered to cover the same natural resources damages. Exxon also removed other non-removable claims that had been joined with the claims of the trust plaintiffs. The district court's Order No. 80 denied the plaintiffs' motions to remand their cases to state court. Those plaintiffs timely appeal.

On February 13, 1992, Alyeska removed approximately 150 cases to federal court. Those plaintiffs had contended that Alyeska had violated state safety standards. Alyeska argued that this raised a federal question because it attacked a 1979 federal district court decree enjoining the state from enforcing certain provisions of the Alaska Tanker Law. The plaintiffs' motions to remand were denied in the district court's Orders Nos. 83, 91, 92, and 108. The plaintiffs timely appeal.

II.

ORDER NO. 80: THE EXXON REMOVALS

A. *Background*

The trust plaintiffs are composed of four environmental organizations—National Wildlife Federation ("NWF"), Wildlife Federation of Alaska ("WFA"), Natural Resources Defense Council ("NRDC"), involved in one action, and Alaska Sportfishing Association ("ASA")—and also four individuals, originally involved in a separate action.

NWF, WFA, and NRDC filed a complaint on August 17, 1989, in *National Wildlife Federation v. Exxon,* Superior Court No. 3AN-89-6957, stating 10 causes of action based on strict liability, negligence, and nuisance. The other plaintiffs stated similar liability claims in the Amended and Consolidated Class Action Complaint filed in *Alaska Sportfishing Association v. Alyeska Pipeline Service Co.,* Superior Court No. 3AN-89-5188, on July 17, 1989.

On September 3, 1991, the trust plaintiffs moved to certify a conservation trust fund class to include "[a]ll persons whose use, enjoyment, aesthetic and environmental interests in the protection and enhancement of the ecosystem, wildlife and other nautral resources of Prince William Sound and the Oil Impact Area" were injured by the oil spill. The class excluded the commercial and subsistence use and enjoyment interests of the classes already certified.

The relief sought by the trust plaintiffs in the certification of the trust fund class was creation of a conservation trust to restore the ecology of the oil impact area, to protect the area from further environmental harm, to restore wildlife populations on land and in the sea, to fund scientific studies and monitoring of the area, and to acquire resources equivalent to those lost in the spill. The

trust plaintiffs claimed that the trust class was necessary because the State of Alaska could not adequately represent them due to its conflict of interest, and noted that Alaska law provides for individual actions where there is a potential conflict of interest between the Government and a class of private persons.

A little over a month after the trust plaintiffs filed for class certification, the Agreement and Consent Decree between the United States, Alaska, and the Exxon and Alyeska defendants was filed in federal court on October 8, 1991. The consent decree stated that the natural resources damages included relief recoverable by the governments "in their capacity as trustees of Natural Resources on behalf of the public" for injury to *all* natural resources resulting from the oil spill, "under *any* federal or state statute or maritime or common law relating to the environment."

The trust plaintiffs, however, proceeded with their action, and filed their reply brief in support of certification of a conservation trust class in state court on October 22, 1991. Anticipating the defense of *res judicata,* the trust plaintiffs argued that the consent judgment was not binding because the State was not fully representative of all interests. They asserted that they were entitled to sue as trustees for public users of the natural resources as a supplement to the damages secured by the State and the United States in the consent decree for two reasons.

First, the trust plaintiffs asserted that the State had a conflict of interest in negotiating the decree because of its own potential liability exposure. Second, they claimed that the settlement did not provide sufficient funds for environmental injuries, a fact that they claimed was indicated by the State's negotiating in secret and it failing to reveal the reports of economic studies on which it had purportedly relied. The trust plaintiffs' reply brief also stated, however, that they were not challenging the government settlement, but were seeking only supplementary

and non-conflicting recovery through the proposed trust fund.

In notices of removal filed November 21, 1991, Exxon removed the trust plaintiffs' cases, *National Wildlife Federation v. Exxon* and *Eyak Native Village v. Exxon,* to federal court. Exxon contended that the trust plaintiffs' October 22, 1991, reply brief, which continued support of certification of a conservation trust fund class to pursue claims for environmental damages on behalf of the general public, was in derogation of the federal judgment and raised a federal question justifying removal of the *National Wildlife* case. Exxon removed the class plaintiffs in the *Eyak* case pursuant to 28 U.S.C. § 1441(c) on the ground that this consolidated class action involved independent claims joined with the *National Wildlife* case.

Exxon also removed *Wisner v. Exxon,* Superior Court No. 3KO-89-265, on the ground that it, too, was joined with the trust plaintiffs' actions.

B. *Trust Plaintiffs' Motion to Remand*

In Order No. 80, the district court denied remand of the trust plaintiffs' cases removed by Exxon. The trust plaintiffs had asserted that they were entitled to seek damages on behalf of the public for injury to natural resources in addition to those that the governments had obtained by the consent judgment. The district court held that removal was appropriate under the authorities that permit removal when a state court litigant makes a collateral attack on a federal judgment. Judge Holland construed the trust plaintiffs' reply brief as seeking relief from the decree on the basis that it was fraudulently obtained.

The district court concluded that the October 22, 1991, reply brief raised a federal claim in the form of an independent action in equity, or a Federal Rule of Civil Procedure 60(b)(3) motion for relief from the consent decree. Relying on *Villarreal v. Brown Express, Inc.,* 529

F.2d 1219, 1221 (5th Cir. 1976), the court concluded that the reply brief raised a federal claim sufficient for removal under 28 U.S.C. § 1441(a).

We review *de novo* the district court's denial of a motion to remand an action removed from state to federal court. *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1371 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987).

Any action based on a claim or right that arises under federal law may be removed to federal court pursuant to 28 U.S.C. § 1441, if a notice of removal is filed within 30 days after the defendant receives "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446 (b) (1988).

Exxon stated as ground for removal that the reply brief, which continued the trust plaintiffs' litigation despite the consent decree, raised a federal question of the construction of the consent decree and whether the consent decree was res judicata as to the trust plaintiffs' claims. In denying the motion to remand, the district court did not rely on this ground but, instead, construed the reply brief as transforming the trust plaintiffs' action into an attack on the consent decree in the nature of a motion or independent action provided for under Rule 60(b).

The reply brief could not be construed as transforming the complaint into a Rule 60(b) motion because it was not made in the federal action. However, Rule 60(b) has a saving clause that preserves a court's power to entertain an independent action in equity to obtain relief from judgment: a motion may be treated as an independent action in equity, or vice versa. 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2868, at 244 (1973). Appellants contend that this was inappropriate because they would have lacked standing to seek Rule

60(b)-type relief because they were not parties to the consent decree. However, a nonparty may seek relief from a judgment procured by fraud if the nonparty's interests are directly affected. *See Kem Manufacturing Corp. v. Wilder*, 817 F.2d 1517, 1521 (11th Cir. 1987); *see also Southerland v. Irons*, 628 F.2d 978, 980 (6th Cir. 1980). Moreover, a court has "inherent power . . . to investigate whether a judgment was obtained by fraud," and may bring before it "all those who may be affected . . . ." *See Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946).

Further, Rule 60(b) or an independent action allows relief from judgment to be given to "a party or his legal representative." This allows one who is in privity with a party to move for relief. 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2865, at 225-26 & n.58 (1973). The citizens whom the trust plaintiffs sought to represent were more than in privity with the State; they were identical. Where the State is a party to relevant proceedings, then citizens are represented in those proceedings and are bound by the judgment. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692-93 n.32, *modified on other grounds*, 444 U.S. 816 (1979); *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958); *United States v. Baker*, 641 F.2d 1311, 1314 n.5 (9th Cir. 1981).

Other jurisdictions have held that an action to obtain relief from a federal judgment presents a general federal question, which may support removal to federal court. *See Villarreal*, 529 F.2d at 1221; *Deauville Assocs., Inc. v. Lojoy Corp.*, 181 F.2d 5 (5th Cir.), *cert. denied*, 340 U.S. 905 (1950); *see also* 7 James W. Moore, et al., Moore's Federal Practice ¶ 60.37[2](3) (federal court should be independent of state law in determining what grounds will support an independent action for relief from a federal judgment); 60.38[1] (such an action involves the validity of the judgment, and the substantive principles of the action are federal) (2d ed. 1993).

The district court's treatment of the trust plaintiffs' claims as an independent action for relief from judgment recharacterized their claims as federal claims, because the alleged conflict of interest of the State and the insufficiency of the recovery implied that the decree was fraudulently obtained. The State of Alaska acted in its capacity as trustee of natural resources on behalf of the public. The general public that the trust plaintiffs sought to represent is the same general public the State represented. The consent decree covered essentially the same claims as were raised by the trust plaintiffs: damage to natural resources. The consent decree specified that it contained full compensation for the public's claim for nautral resources damages.

The district court noted that the reply brief asserted that the State had a conflict of interest in representing the public's interest in natural resources and quoted the following portions of the reply brief:

> As a predominant common issue in this controversy, Trust Class Plaintiffs contend that because of divergent and potentially conflicting interests with the environmental interests of private persons, the settlement by the State was insufficient.
>
> . . . .
>
> In contrast to the relief Trust Class Plaintiffs seek here relating only to the environment and its use, the State when negotiating its setttlement, not only had a legitimate variety of divergent public interests such as cost and economic concerns, past and future dealings with the oil industry and these settling defendants, and employment, budgetary and political objectives, but it also, most critically, had its own potential liability exposure in these cases, and thereby obtained important individual monetary and nonmonetary benefits for itself, not its citizens, as part of the Exxon settlement and Plea Agreement.

The district court also noted that the reply brief asserted that the State had breached its fiduciary duties and quoted the following portion of the reply brief:

> In addition, Trust Class Plaintiffs contend that the settlement reached between the State and Exxon provided insufficient dollars for presently known environmental injuries because the State negotiated in secret with Exxon, and has not revealed the actual reports of economic studies, on which it purportedly relied in negotiating the settlement.

The district court stated:

> The court views these statements implying that the consent decree was fraudulently obtained because the State acted in a capacity other than the trustee capacity it represented to the court it was acting under, and because the withholding of the studies kept the court and the public from ascertaining the extent of the insufficiency of the settlement.

The district court noted that sections 3 and 6 of the consent decree provide as follows:

> 3. "State" means the State of Alaska, *in all its capacities,* including all departments, divisions, independent boards, administrations, *natural resource trustees,* and agencies of the state government.
>
> . . . .
>
> 6(d). "Natural Resource Damages" means compensatory and remedial relief recoverable by the Governments *in their capacity as trustees of Natural Resources on behalf of the public* for injury to, destruction of, or loss of any and all Natural Resources resulting from the Oil Spill, whether under the Clean Water Act, . . ., the Trans-Alaska Pipeline Authorization Act, . . ., or any federal or state statute or maritime or common law relating to the environment . . . .

(Emphasis added by district court.) Thus, the district court correctly concluded that the trust plaintiffs were seeking to set aside the provision of the consent decree that provided it was in full payment for the damages to the public's natural resources. The ground for this relief was that the State had purported to represent the public's interest in restoring the natural resources while it had an adverse governmental interest. Thus, the contention is that the State operated in derogation of its fiduciary duties imposing a fraud on the court.

Although the original complaint did not set forth a removable claim, the reply brief did. Section 1446(b) provides in relevant part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order *or other paper* from which it may first be ascertained that the case is one which is or has become removable . . . .

28 U.S.C. § 1446(b) (emphasis added). The reply brief constitutes the "other paper" justifying the removal.

Appellants contend that removal was untimely because the reply brief did not change the basic theory and nature of the claims, or the relief sought in the form of a conservation trust. They maintain that the appellees were on notice of any purported federal question on which removal could be based, at latest when the trust plaintiffs filed their class certification motion on September 3, 1991. That motion sought certification of a class of all persons "whose use, enjoyment, aesthetic and environmental interests in the protection and enhancement of the ecosystem, wildlife and other natural resources" were injured by the spill. The motion referred to the governmental decree negotiations and the State's alleged conflict of interest. The appellants contend that any removal notice should have been filed within 30 days of that motion.

However, as Judge Holland concluded, the case became removable only when the trust plaintiffs made clear after the consent decree was entered on October 8, 1991, that they intended to pursue additional relief for natural resource damage. The trust plaintiffs would have to be relieved of the consent decree in order to obtain damages beyond those awarded in the consent decree, because it was stated to be full compensation for the public's claim for natural resources damages.

The reply brief was served on October 22, 1991. Because notices of removal were filed on November 21, 1991, removal was within the 30-day period required by section 1446(b) and was timely. The consent decree itself could not have triggered removability because 28 U.S.C. § 1446(b) requires the receipt *by the defendants* of a paper in the action from which removability may be ascertained. The consent decree was not filed in state court in these cases. The reply brief triggered removal, and the Order No. 80 removal notices were timely.

C. *Class Action Plaintiffs' Motion to Remand*

Appellants ask that 14 of the class actions and the *Wisner* case be remanded to state court because the removals were based on a misapplication of 28 U.S.C. § 1141(c). That statute provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. § 1441(c) (Supp. IV 1992).

The plaintiffs in 15 class actions filed in state court filed an Amended Consolidated Class Action Complaint

("Consolidated Complaint").[2] One of the class actions among the 15 was that filed by Alaska Sportfishing Association and several individuals. It is clear that this class action was properly removed because Alaska Sportfishing and the individuals joined the trust plaintiffs' action. The issue is whether the claims of the remaining class action plaintiffs were properly removed. This depends upon the resolution of whether the Consolidated Complaint joined all 15 class actions and, thus, made them removable as a group.

The Consolidated Complaint, filed on July 17, 1989, sought to create from the 15 separate class actions a consolidation into 5 new proposed classes. The complaint designated which of the plaintiffs in the 15 class actions would be representatives in the 5 superseding classes. The proposed classes were:

1. Alaska Native Class
2. Commercial Fishing Class
3. Processor/Distributor Class
4. Area Business Class
5. Use and Enjoyment Class.[3]

The appellants argue that the Amended Consolidated Complaint left intact the 15 prior class actions. However, this is not a situation in which the class representatives joined in a joint motion or discovery action. This is a

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[2] The 15 class actions were as follows: The Eyak Native Village, Cordova District Fishermen United, Prince William Sound Settnetters Association, Philip G. McCrudden, Samish Maritime, Inc., Randall P. Babich, Albert Carroll, Ina Thorne, Edward Gregorieff, Kent Herschleb, Marc Van Driessche, Keith H. Gordaoff, Tom Copeland, Sea Hawk Seafoods, and Alaska Sportfishing Association.

[3] In Pretrial Order No. 22, February 14, 1991, the Superior Court certified the Alaska Native Class, the Commercial Fishing Class, the Area Business Class, and the Property Owner Class. The motion for certification of a Use and Enjoyment Class was denied in Pretrial Order No. 24, February 14, 1991.

situation in which a whole new complaint was voluntarily filed, designating five entirely different classes. The representatives of some of the new classes came from several of the prior classes; for example, the proposed representatives for the Commercial Fishing Class came from 12 of the previously separate class actions.

The plaintiffs in the Amended Consolidated Complaint were free voluntarily to file an amended complaint, joining their claims and designating new classes, because the defendants had not answered. No court order was required. The plaintiffs did not seek in the Consolidated Complaint to preserve the individual identity of their former class action complaints. As the district court observed, "Fifteen separate class actions could not be transformed into 5 proposed classes without the claims being joined." The same principle applies to the plaintiffs in the *Wisner* case, who later joined in the consolidated action.

The class action plaintiffs argue that the Consolidated Complaint did not join the individual class actions because an earlier state pretrial consolidation order, entered by Judge Shortell, provided that papers filed in the *Exxon Valdez* litigation could be made applicable to multiple actions by including the title and docket number of each action in the caption of the document filed. The appellants contend that by listing each short title and docket number, the separate identities of the cases were preserved. They rely on *Katz v. Realty Equities Corp.*, 521 F.2d 1354, 1358 (2d Cir. 1975), *In re Wirebound Boxes Antitrust Litigation*, 128 F.R.D. 262, 264 (D. Minn. 1989), and *In re Equity Funding Corp. of America Securities Litigation*, 416 F. Supp. 161, 176-77 (C.D. Cal. 1976), for the proposition that "consolidation cannot effect a physical merger of the actions or the defenses of the separate parties." *Katz*, 521 F.2d at 1358.

However, none of those cases involved the certification of classes that drew plaintiffs from a variety of other class

actions. As we have noted in this litigation, several of the originally individual actions have plaintiffs in more than one new class, and several new classes certified by Judge Shortell contain plaintiffs from more than one of the original cases.

Furthermore, the removal context of the question before us also distinguishes *Katz, Wirebound Boxes,* and *Equity Funding.* In all three cited cases, the consolidated complaints were ordered by the district courts. Judge Shortell did not order the plaintiffs to file a consolidated complaint. In *Wirebound Boxes* and *Equity Funding,* the courts stated that at the conclusion of pretrial proceedings, they would consider whether it was appropriate to preserve for trial and judgment the separate identities of the actions consolidated for pretrial purposes. *Wirebound Boxes,* 128 F.R.D. at 264; *Equity Funding,* 416 F. Supp. at 177 n.12. Judge Shortell made no similar statement. The appellants point to his use of the plural form of "cases" in certain of his orders, but there is no clear indication that the separate identities of the cases were to be preserved. In fact, as Judge Holland reasoned, the plaintffs' proposal to form 5 classes out of 15 cases indicates just the opposite. Thus, we have more than consolidation alone. *See Katz,* 521 F.2d at 1358.

A class action is "a multiple joinder device, permitting the litigation, in one single action, of multiple claims involving similar or identical questions of law and fact, usually arising from the same set of operative facts." *Lesch v. Chicago & Eastern Illinois R.R. Co.,* 279 F. Supp. 908, 911 (N.D. Ill. 1968). Although the appellants originally filed their class actions separately, they subsequently filed an amended complaint requesting five superseding classes to be constituted of their various individual plaintiffs. We hold that the class actions were joined.

Similarly, the *Wisner v. Exxon Corporation* plaintiffs became part of the action. They joined the class action plaintiffs' motion for class certification, even though the

plaintiffs in *Wisner* had filed their own class action motion and complaint, and were not parties to the Consolidated Complaint. After the state court certified the classes, the *Wisner* plaintiffs became representatives of the Commercial Fishing Class, the Area Business Class, and Property Owner Class. Thus, *Wisner* was joined with the other class actions.

Because the plaintiffs are all in the same case as plaintiffs Alaska Sportfishing Association, who were part of the proposed Conservation Trust Class, asserting a removable claim, Judge Holland properly determined that the claims of the class action plaintiffs were removable pursuant to 28 U.S.C. § 1441(c).

The class action plaintiffs contend that even if there were a joinder with the action of the trust plaintiffs, the removal was not proper because it failed to meet the "separate and independent claim" requirement of section 1441(c). The trust plaintiffs' claims are clearly separate and independent from the claims of the class action plaintiffs and *Wisner* plaintiffs. The plaintiffs are "proceeding to enforce rights that are individual to them," not rights that are jointly held by them. 1A James W. Moore, et al., Moore's Federal Practice ¶ 0.163, at 336 (2d ed. 1993). That is, each of the plaintiffs had a separate and independent claim against the defendants, which could have been sued upon alone without joinder of the other plaintiffs. *See, e.g., Northside Iron and Metal Co. v. Dobson and Johnson, Inc.*, 480 F.2d 798, 801 (5th Cir. 1973). The trust plaintiffs were seeking relief for the general public for damages to the natural resources, whereas the class action plaintiffs were seeking compensatory relief for damages suffered by each member of their classes. The claims were separate and independent. The trust plaintiffs' claims were removable. Thus, the entire case is properly removable under section 1441(c). *See also Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433 (6th Cir. 1975).

American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951), does not counsel otherwise. *Finn* involved multiple claims by one plaintiff against three defendants, arising out of a fire loss on property owned by the plaintiff. *Id.* at 7-8. The causes of action against two of the defendents, out-of-state insurance companies, would have been removable if sued upon alone. *Id.* at 8.

The Court analyzed Finn's pleading and determined that a single wrong, the failure to compensate Finn for the property loss, had occurred, *id.* at 14, and that substantially the same facts were contained in the allegations against all three defendants. Consequently, the Court concluded that the claims for relief were not separate and independent, and that removal was not justified. *Id.* at 16.

It is not clear that the rationale of *Finn* applies to the claims of multiple plaintiffs. In any event, the multiple plaintiffs before us have suffered distinctly different harms as a result of the oil spill, and, if they prevail on their claims, are entitled to separate recoveries. Under the *Finn* definition of "cause of action," different "primary rights" are being asserted by different plaintiffs. The claims are separate and independent, and properly were removed.

III.

ORDERS NOS. 83, 91, 92, 108: ALYESKA REMOVALS

On February 13, 1992, Alyeska filed a notice of removal, based on the Plaintiffs' Preliminary Designation of Issues for Trial, filed February 3, 1992. The plaintiffs indicated in that paper that they would support their negligence claims at trial with evidence concerning Alyeska's disregard for tanker and equipment safety standards. Alyeska contended that this raised a federal question because any such claim would be barred by, or would amount to a collateral attack on, injunctions which several oil companies had obtained 15 years earlier against

the state's enforcement of certain provisions of the 1976 Alaska Tanker law. *See Chevron, U.S.A., Inc. v. Hammond,* 1978 Am. Mar. Cas. 1697 (D. Alaska 1978) (some provisions of Alaska Tanker Law are preempted by federal Ports and Waterways Safety Act of 1972, 46 U.S.C. §§ 3701-3718 ("PWSA")).

In Orders Nos. 83, 91, 92, and 108, Judge Holland denied a motion to remand the approximately 150 cases removed by the Alyeska defendants on February 13, 1992. He reasoned that the state law claims were an indirect attempt to enforce the requirements of the Alaska Tanker Law and, therefore, were a collateral attack on *Chevron.* Judge Holland also rejected the plaintiffs' argument that Alyeska's removal was untimely.

The Alyeska removals were triggered by the plaintiffs' suggestion that they would support their negligence claims with evidence concerning Alyeska's disregard of tanker and equipment safety issues. Alyeska's theory of the removal is that any state tort remedy is preempted by the Ports and Waterways Safety Act, 46 U.S.C. §§ 3701-3718, and barred by past injunctions enforcing federal preemption against state regulatory action: Evidence concerning tanker design and other safety measures cannot be used to establish the proper standard of care because the court, in *Chevron v. Hammond, id.*, has already held that the PWSA preempts state regulation of tanker design and other safety measures. Alyeska reasons that the plaintiffs' action amounts to a collateral attack on the district court's past injunctions, and presents a general federal question. The district court held that the plaintiffs were mounting a collateral attack against *Chevron v. Hammond* because the plaintiffs indicated that they would ask the jury to characterize as "reckless" conduct that complies with federal law.

We need not consider the merits of these removals because the notices of removal at issue in Orders Nos. 83,

91, 92, and 108 were untimely. A notice of removal must be filed within 30 days after the defendant receives "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . . ." 28 U.S.C. § 1446(b). Alyeska's notices were filed 10 days after the February 3, 1992, filing of Plaintiffs' Preliminary Designation of Issue for April 1993 Trial in state court. However, no new claims were raised in that document.

The Preliminary Designation essentially asserted that Alyeska caused the oil spill by failing to require use of vessels with double hulls, failing to provide tug escorts and special monitoring systems, and by having the federal district court invalidate Alaska laws that required such measures in *Chevron v. Hammond,* No. A77-195 Civil. The plaintiffs also claimed natural resources damages. The removal was based on the theory that the plaintiffs were collaterally attacking the prior federal judgment in *Chevron.*

These claims were not new. The claims that Alyeska had negligently caused the spill were mentioned in the Plaintiffs' Supplemental Submission in Support of the Case Management Plan, filed Nov. 8, 1991. That memo stated that the factual issues included:

> f. Whether the use of single hull, high tensile steel construction was sufficient to allow the *EXXON VALDEZ* to safely engage in the trade for which it was intended.
>
> . . . .
>
> i. Whether defendants took adequate preventative measures to minimize the possibility of a spill, in view of the known risk of a spill.

The memo did not indicate in any way that paragraphs (f) and (i) did not apply to Alyeska.

Appellees contend that the claims related to double-hulled tankers were asserted only against Exxon Shipping Company and Exxon Corporation, not against Alyeska defendants. They argue that the claims that Exxon Shipping Company or Exxon Corporation negligently caused the spill, in part because a single-hulled vessel was used, were not substantial enough to support removal as long as they were asserted only as part of a larger claim of negligence against Exxon Shipping Company and Exxon Corporation. *See Hunter v. United Van Lines,* 746 F.2d 635, 646 (9th Cir. 1984), *cert. denied,* 474 U.S. 863 (1985). A *substantial* proposition of federal law must form a " 'direct and essential element of the *plaintiff's* cause of action' " for federal jurisdiction to be appropriate. *See id.* at 644 (citation omitted). The issue is whether, and when, this was so with regard to Alyeska, thereby enabling Alyeska to argue that the claims involved a collateral atttack on *Chevron.*

Appellees contend that the plaintiffs asserted a new claim in the Preliminary Designation by arguing that Alyeska caused the spill by not requiring the measures at issue in *Chevron.* Thus, the federal issues became substantial enough to support removal when the Preliminary Designation was filed.

However, it is clear that Alyeska was aware of the nature of the plaintiffs' claims and their possible connection to *Chevron v. Hammond* long before the removal notices were filed. Eight months earlier, on May 31, 1991, Alyeska stated that the plaintiffs had alleged and put in question tanker design and operation, including the issue of double hulls, and that the actions could not be tried without discovery into the federal government's role in establishing tanker design. The Defendants' Response explained how "the private defendants" would respond to those allegations, and did not distinguish between Alyeska and Exxon. The defendants clearly identified which de-

fendants were concerned with certain of the plaintiffs' allegations.[4]

Further evidence that Alyeska was aware of the nature of the plaintiffs' claims is Alyeska's assertion of a federal preemption defense in its answer filed October 29, 1990, in which Alyeska stated, "certain claims of plaintiff are barred or limited by the comprehensive system of federal statutes and regulations and by maritime and admiralty law." Appellees contend that the defense did not refer to the PWSA and was not asserted to rebut a claim that the Alyeska defendants negligently caused the spill by failing to implement the measures at issue in *Chevron*. Rather, the answer was intended to preserve the defense that some of plaintiffs' claims related to the alleged negligence in the clean up were preempted by the TAPAA. However, the plain language of paragraph 13 of the answer is quite broad, and separate affirmative defenses asserted in the answer refer to TAPAA. Although the defense of preemption does not support removal, the answer indicates that Alyeska was aware at that time of the nature of the plaintiffs' claims and their possible connection to *Chevron v. Hammond*.

Alyeska's removal notices were untimely.

CONCLUSION

Order No. 80 is affirmed. The other orders are reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

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[4] For example, in the very next section of the response, the defendants explain how Exxon Shipping and Exxon Corporation would respond to other allegations concerning details of the accident. Alyeska is not mentioned in that section.

APPENDIX B

[Filed June 3, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A89-095 Civil

(Consolidated)

IN RE THE EXXON VALDEZ

ORDER NO. 80

Motions to Remand A91-567 & A91-568

On April 24, 1992, the court heard oral argument on two related motions to remand. The court took both motions under advisement. The first motion heard was the Trust Plaintiffs' [1] motion to remand Case No. A91-567 Civil and Case No. A91-568 Civil. The second motion

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[1] The Trust Plaintiffs consist of those plaintiffs who sought certification in state court as the "Conservation Trust Class". The Trust Plaintiffs were drawn primarily from two separate cases. Environmental interests were represented by Trust Plaintiffs National Wildlife Federation (P-1602), Natural Resources Defense Council (P-273), and Wildlife Federation of Alaska (P-1603) who were in the state case *National Wildlife Federation v. Exxon*, No. 3AN-89-6957, which became No. A91-567 Civil when it was removed to this court. Recreational interests were represented by the remaining Trust Plaintiffs Alaska Sportfishing Association (P-139), Zenas (Ed) Zeine (P-301), Joe Klouda (P-299), Allen Tygert (P-143), and Bill Simmons (P-300) who were in the state case *Alaska Sportfishing Association v. Alyeska Pipeline Service Company*, No. 3AN-89-5188, which was included in *The Eyak Native Village v. Exxon* which became No. A91-568 Civil when it was removed to this court.

heard was the State Court Class Plaintiffs'[2] motion to remand Case No. A91-568.

Trust Plaintiff's Motion to Remand

In the consolidated state court *Exxon Valdez* litigation, the Trust Plaintiffs filed a motion for certification of a "Conservation Trust Class".[3] The "Conservation Trust Class" was distinguished from the previously proposed "Use and Enjoyment Class" in that the Conservation Trust Class included the environmental organizations which had objected to the Use and Enjoyment Class and the Trust Plaintiffs did not seek individual monetary compensation as was the case for the Use and Enjoyment Class.

In their October 22, 1991, reply brief in support of certification of a Conservation Trust Class[4] (hereinafter

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[2] The State Court Class Plaintiffs consist of the class action cases which were listed along with *Alaska Sportfishing Association v. Alyeska Pipeline Service Company*, No. 3AN-89-5188, on the Amended and Consolidated Class Action Complaint (hereinafter CCAC) filed in the consolidated state court action; and *Kodiak Island Borough v. Exxon*, No. 3KO-89-264, and *Wisner v. Exxon*, No. 3KO-89-265, which joined with the CCAC plaintiffs in obtaining class certification in the state court. (*National Wildlife Federation v. Exxon*, No. 3AN-89-6957, now No. A91-567, was not one of the cases listed in the CCAC.) The various class actions were removed to this court as *The Eyak Native Village v. Exxon*, No. A91-568 Civil. The four classes eventually certified in state court were: 1) Alaska Natives, 2) Commercial Fishing, 3) Area Business, and 4) Property Owners. *Alaska Sportfishing Association v. Alyeska Pipeline Service Company*, No. 3AN-89-5188, was not included in any class certified. The "Use and Enjoyment Class" proposed by the CCAC, which would have included *Alaska Sportfishing Association v. Alyeska Pipeline Service Company*, No. 3AN-89-5188, was not certified.

[3] Exhibit B to Defendants' Opposition to Motions to Remand (Clerk's Docket No. 2072).

[4] Exhibit A to Defendants' Opposition to Motions to Remand (Clerk's Docket No. 2072).

referred to as Reply), the Trust Plaintiffs made certain assertions which the Exxon defendants [5] viewed as indicating an intent by Trust Plaintiffs to pursue a collateral attack on the consent decree entered in this court in *United States v. Exxon,* No. A91-082 Civil, and *State of Alaska v. Exxon,* No. A91-083 Civil.[6] Defendants removed *National Wildlife Federation v. Exxon,* No. 3AN-89-6957 (now Case No. A91-567 Civil), pursuant to 28 U.S.C. § 1441(a), on the basis that the assertions made in the Reply raised a federal claim. At the same time, defendants removed *The Eyak Native Village v. Exxon,* No. A91-568 Civil, on the same federal claim basis.[7]

Defendants Alyeska Pipeline Service Company (D-3), Amerada Hess Pipeline Company (D-11), Arco Transportation Alaska, Inc. (D-12), Mobil Alaska Pipeline Company (D-14), B.P. Pipelines (Alaska), Inc. (D-19), Phillips Alaska Pipeline Corporation (D-20), and Unocal Pipeline Company (D-21) consented to the removal in Case No. A91-567.[8] The same defendants, plus George M. Nelson (D-9), also consented to the removal in Case No. A91-568.[9]

Subsequent to the Exxon defendants' removal of Case No. A91-567 Civil and Case No. A91-568 Civil, the

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[5] Exxon Shipping Company (D-2), Exxon Corporation (D-1), and Exxon Pipeline Company (D-10).

[6] Agreement and Consent Decree, October 8, 1991 (Clerk's Docket No. 46 in A91-082; Clerk's Docket No. 26 in A91-083).

[7] The plaintiffs other than the Trust Plaintiffs in *Eyak Native Village* were removed pursuant to 28 U.S.C. § 1441(c), which provides that an entire case shall be removed when a separate and independent claim, which is removable, is joined with one or more otherwise non-removable claims. The removal of these other plaintiffs is the subject of the second motion to remand.

[8] Clerk's Docket No. 2004.

[9] Clerk's Docket No. 2008.

Alyeska defendants [10] removed almost all of the *Exxon Valdez* cases which remained in state court. Alyeska filed a suggestion with the court that a decision on the motions to remand Case No. A91-567 and Case No. A91-568 be deferred until the anticipated motions to remand the cases Alyeska removed were decided. Alyeska noted that if Case No. A91-567 and Case No. A91-568 were remanded first, Alyeska would still have the ability to remove them again based on the grounds used to remove the other state court cases. The State Court Class Plaintiffs objected to Alyeska's suggestion. The court has chosen to proceed with a decision on the motions to remand Case No. A91-567 and Case No. A91-568, nevertheless.

The basis for removal was that the assertions made in Trust Plaintiffs' Reply raised a federal claim. Trust Plaintiffs asserted in their Reply that there were natural resources damages available to them as a "supplement" to those obtained by the State of Alaska and the United States in the consent decree. Trust Plaintiffs advanced two reasons why "supplemental" damages existed.

First, Trust Plaintiffs alleged that the State of Alaska had a conflict of interest in representing the public's interest in natural resources:

> As a predominant common issue in this controversy, Trust Class Plaintiffs contend that because of divergent and potentially conflicting interests with the environmental interests of private persons, the settlement by the State was insufficient.

Reply at 12. Trust Plaintiffs also asserted:

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[10] The Alyeska defendants are: Alyeska Pipeline Service Company (D-3), Arco Transportation Alaska, Inc. (formerly known as Arco Pipeline Company) (D-12), Amerada Hess Pipeline Corporation (D-11), B.P. Pipelines (Alaska), Inc. (D-19), Mobil Alaska Pipeline Company (D-14), Unocal Pipeline Company (D-21), Phillips Alaska Pipeline Corporation (D-20), and George M. Nelson (D-9).

> In contrast to the relief Trust Class Plaintiffs seek here relating only to the environment and its use, the State when negotiating its settlement, not only had a legitimate variety of divergent public interests such as cost and economic concerns, past and future dealings with the oil industry and these settling defendants, and employment, budgetary and political objectives, but it also, most critically, had its own potential liability exposure in these cases, and thereby obtained important individual monetary and nonmonetary benefits for itself, not its citizens, as part of the Exxon settlement and Plea Agreement.

Reply at 12-13.

Second, Trust Plaintiffs implied that the State of Alaska breached its fiduciary duties as trustee for the public interest by keeping studies of natural resources damages secret:

> In addition, Trust Class Plaintiffs contend that the settlement reached between the State and Exxon provided insufficient dollars for presently known environmental injuries because the State negotiated in secret with Exxon, and has not revealed the actual reports of economic studies, on which it purportedly relied in negotiating the settlement.

Reply at 14.

The court views these statements as implying that the consent decree was fraudulently obtained because the State acted in a capacity other than the trustee capacity it represented to the court it was acting under,[11] and be-

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[11] Paragraph 6(d) of the consent decree reads:

> (d) "Natural Resource Damages" means compensatory and remedial relief recoverable by the Governments *in their capacity as trustees of Natural Resources on behalf of the public* for injury to, destruction of, or loss of any and all Natural Resources resulting from the Oil Spill, whether under the Clean

cause the withholding of the studies kept the court and the public from ascertaining the extent of the insufficiency of the settlement. The court notified [12] the parties for purposes of oral argument that its tentative view was that the Trust Plaintiffs' Reply raised a federal claim in the form of a Rule 60(b)(3)[13] motion for relief from the consent decree. *See Villarreal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976). Oral argument did not change the court's perception of the allegations made by the Trust Plaintiffs.

Trust Plaintiffs sought to avoid the consequences of the allegations made in the Reply by also making numerous statements that they did not intend any challenges to the consent decree or the trustee status of the State:

> Consequently, to the extent Trust Class claims may overlap in part with any similar ones pursued by the state and federal governments, they are supplementary to, and not in conflict with, any settlement recoveries obtained by the government for natural resources.

> Water Act, . . . , the Trans-Alaska Pipeline Authorization Act, . . . , or any federal or state statute or maritime or common law relating to the environment . . . . (emphasis added)

Paragraph 3 of the consent decree reads:

> 3. "State" means the State of Alaska, *in all its capacities*, including all departments, divisions, independent boards, administrations, *natural resource trustees*, and agencies of the state government. (emphasis added)

[12] Notice of Oral Argument (Clerk's Docket No. 2391). Trust Plaintiffs filed a response to the Notice (Clerk's Docket No. 2479).

[13] Fed. R. Civ. P. 60(b)(3):

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) . . .; (2) . . .; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) . . . .

> The suggestion by the State that the purpose of this suit is to displace the State as the natural resource Trustee is contrary to fact and without merit. . . . These plaintiffs seek only conservation class trustee status themselves for non-conflicting and supplemental environmental redress they may achieve.

Reply at 4-5. Trust Plaintiffs also stated:

> Nor will pursuit of this class action have any adverse effect on the settlement between Exxon Defendants and the state and federal government.
>
> . . .
>
> Moreover, because Trust Class Plaintiffs contend these settlement recoveries are grossly insufficient . . ., it follows that the extent to which Trust Class claims may overlap in part with any similar ones pursued by the State, they are *supplementary to* and *not in conflict with*, any settlement recoveries obtained by the State for natural resources.

Reply at 16.

Trust Plaintiffs argue that "[a]t most, plaintiffs' observations regarding the federal settlement anticipated a partial or complete federal defense to their state-law claims." [14]

It is settled law that a case may not be removed to federal court on the basis of a federal defense even if the defense is anticipated in the plaintiff's complaint. *Caterpillar Inc. v. Williams,* 482 U.S. 386, 393 (1987). Defendants' potential defense of *res judicata* regarding the consent decree would not necessarily be a federal defense. But even if it was so characterized, Trust Plaintiffs' response to that anticipated defense was:

> Trust Class Plaintiffs were nonparties in the federal action that was settled and were not signatories to

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[14] Trust Plaintiffs' Motion for Remand at 14 (Clerk's Docket No. 2046).

> the settlement. The settlement is not binding on them or the class.

Reply at 16. That statement does not raise a federal claim. However, Trust Plaintiffs went beyond responding to an anticipated federal defense when they alleged that the consent decree did not represent full compensation for natural resources because of the State's conflict of interest and breach of fiduciary responsibility.

The allegations Trust Plaintiffs made regarding the conduct of the State in negotiating the consent decree raise an independent action in equity, or a Rule 60(b)(3) motion, for relief from the federal judgment. In substance, Trust Plaintiffs requested relief from the consent decree to the extent that it was considered to be full compensation for the public's claim for natural resources damages.

The consent decree purported to fully compensate the State as trustee for the public's interest for damages to natural resources. Regardless of whether Trust Plaintiffs confine their action to only state law, Trust Plaintiffs are seeking to have the defendants pay them compensation for the same natural resource damages compensated for in the consent decree. Consequently, defendants have filed a motion for summary judgment in Case No. A91-567 and Case No. A91-568. The issues raised by the motion for summary judgment are: 1) whether the consent decree constitutes a final judgment that is *res judicata* as to all citizen suits; and 2) whether under the Clean Water Act federal and state trustees have the power to pursue and resolve claims regarding injury to the environment to the preclusion of other suits for similar relief. However, even if Trust Plaintiffs prevail on the motion for summary judgment and are allowed to proceed with their citizen suit, there still remains the issue of double recovery.

Trust Plaintiffs addressed that issue in their Reply:

> In any event, to the extent Trust Class Plaintiffs are seeking overlapping types of environmental re-

> lief with the State, a double recovery may be prevented by pro tanto setting off the amount of the State settlement recovery against any judgment obtained by Trust Class Plaintiffs.

Reply at 17. However, in order to have a *pro tanto* set off, it is necessary for the Trust Plaintiffs to be relieved of the consent decree to the extent that it is considered to be *full* compensation for the public's claim for natural resources damages. Trust Plaintiffs' allegations as to why the settlement does not represent full compensation are such that they raise an independent action in equity, or Rule 60(b)(3) motion, which is a federal claim sufficient to support removal under 28 U.S.C. § 1441(a).[15]

For purposes of Rule 60(b)(3), it does not matter whether the Trust Plaintiffs are determined by the court to be parties to the consent decree. A nonparty may raise a challenge of fraud on the court if the nonparty's interests are directly affected by the final judgment. *Kem Manufacturing Corp. v. Wilder,* 817 F.2d 1517, 1521 (11th Cir. 1987); *Southerland v. Irons,* 628 F.2d 978, 980 (6th Cir. 1980). Furthermore, it does not matter that the Trust Plaintiffs did not specifically raise the fraud issue as a Rule 60(b)(3) motion. The court may act on its own

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[15] 7 Moore's Federal Practice (2nd ed.) § 60.38[1] at 60-401:

> But an [independent] action [in equity] to enjoin or otherwise obtain relief from a federal judgment involves the validity of the judgment as a continuing obligation; the substantive principles of the action are federal; and, we believe, presents a general federal question.

Villarreal v. Brown Express, Inc., 529 F.2d 1219, 1221 (5th Cir. 1976):

> The proper avenue of redress for a party seeking relief from a judgment claiming fraud as grounds for relief is under Fed. R. Civ. P. 60(b)(3). "If the independent action is brought in a state court, it may be removed to the appropriate federal court on the basis of a general federal question." (citations omitted)

motion when it is charged that its judgment has been secured by fraud. *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 523 n.5 (3rd Cir. 1948), *cert. denied*, 335 U.S. 912 (1949).

Because the court has determined that the allegations made in the Reply raise a federal claim, the court does not need to reach the defendants' federal *res judicata* and impermissible collateral attack arguments.

Trust Plaintiffs did advance as an alternative basis for remand that defendants' notice of removal was untimely under 28 U.S.C. § 1446(b).[16] The independent action in equity, or Rule 60(b)(3) motion, which raised the federal claim could not have occurred prior to the Reply which was the first document filed in the case after the consent decree was entered. The consent decree itself could not start the 30-day period because it was not filed in this litigation and it was not filed by the Trust Plaintiffs. The Reply was served on defendants on October 22, 1991. Removal occurred on November 21, 1991, within the 30-day period of § 1446(b). The notice of removal was, therefore, timely.

Trust Plaintiffs' motion to remand is denied. The Clerk of Court is directed to reopen *United States v. Exxon*, Case No. A91-082 Civil, and *State of Alaska v. Exxon*, Case No. A91-083 Civil, and consolidate them with *National Wildlife Federation v. Exxon*, Case No. A91-567 Civil and *The Eyak Native Village v. Exxon*, Case

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[16] 28 U.S.C. § 1446(b):

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

No. A91-568 Civil (which are both already consolidated into *In re the Exxon Valdez,* Case No. A89-095 Civil), for the limited purpose of determining the independent action in equity, or Rule 60(b)(3) motion, raised here and the motion for summary judgment filed by defendants in Case No. A91-567 and Case No. A91-568.[17]

The United States, the State of Alaska and the Exxon defendants shall have sixty (60) days from the date of this order in which to file an opposition to the Trust Plaintiffs' Rule 60(b)(3) motion. The Trust Plaintiffs shall have thirty (30) days after service of the oppositions in which to reply.

The United States and the State of Alaska shall have sixty (60) days from the date of this order in which to respond to Exxon's fully briefed motion for summary judgment. Trust Plaintiffs and the Exxon defendants shall have thirty (30) days after service of the responses in which to reply.

If oral argument is deemed appropriate and necessary, it will be scheduled by the court as soon as possible after the motions are briefed.

State Court Class Plaintiffs Motion to Remand A91-568

The State Court Class Plaintiffs (hereinafter referred to as Class Plaintiffs) were removed to this court in *The Eyak Native Village v. Exxon,* A91-568 Civil, pursuant to 28 U.S.C. § 1441(c). Section 1441(c) provides:

> (c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or

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[17] The United States was granted leave to file an *amicus curiae* memorandum in Case No. A89-095 prior to oral argument on this motion to remand. (Clerk's Docket No. 2473). In that memorandum, the United States expressed concerns about reopening Case No. A91-082 and Case No. A91-083. Reopening these two cases for the limited purpose stated does *not* vacate the judgment.

> more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

This court's ruling in the Trust Plaintiffs' motion to remand, which determined that the Reply raised an independent action in equity, or Rule 60(b)(3) motion, satisfies the § 1331 federal question jurisdiction requirement of § 1441(c). The parties agree that the Class Plaintiffs' claims are "otherwise non-removable".

The issues raised by the Class Plaintiffs' motion to remand are: 1) whether the Class Plaintiffs' claims were joined with those of certain of the Trust Plaintiffs; [18] and 2) whether the claim of certain of the Trust Plaintiffs was a "separate and independent" claim from the claims of the Class Plaintiffs.

This court's tentative view was that the claims of the Class Plaintiffs and the Trust Plaintiffs were joined by the Amended and Consolidated Class Action Complaint (CCAC) and the Stipulation Regarding Amendment of Amended Complaint (Stipulation).[19] The court has reconsidered its position to find that the claims were joined by the CCAC alone.

The Class Plaintiffs' CCAC, which was filed in state court, listed 15 separate class actions which were pending

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[18] Trust Plaintiffs National Wildlife Federation, Natural Resources Defense Council, and Wildlife Federation of Alaska (environmental plaintiffs) did not maintain a class action in state court. They were plaintiffs in the individual action *National Wildlife Federation v. Exxon*, No. 3AN-89-6957. No argument can be made that the claims of the environmental plaintiffs were joined with the claims of the Class Plaintiffs. However, in the Reply, both the environmental Trust Plaintiffs and the recreation Trust Plaintiffs jointly made the allegations which raised the federal claim.

[19] Notice of Oral Argument (Clerk's Docket No. 2391).

in state court at that time.[20] The CAC proposed that 5 separate classes be certified from those 15 listed class actions. *Alaska Sportfishing Association v. Alyeska Pipeline Service Co.*, No. 3AN-89-5188, was one of the 15 class actions included in the CCAC. Two of the plaintiffs named as class representatives in *Alaska Sportfishing Association* (No. 3AN-89-5188) are also Trust Plaintiffs before this court: Alaska Sportfishing Association (ASA) and Allen Tygert. ASA and Tygert were proposed as representatives of the Use and Enjoyment Class in the CCAC. The Use and Enjoyment Class was not certified even though the other four classes proposed in the CCAC were certified.[21]

Class Plaintiffs rely on Judge Shortell's Pre-Trial Order No. 1 as support for their position that the claims were not joined.[22] Pre-Trial Order No. 1 provides, in pertinent part:

> A. *Consolidation*
>
> 1. The above-captioned actions are hereby consolidated for pretrial purposes and are collectively referred to as the "Exxon Valdez Oil Spill Litigation." No action taken hereunder shall have the effect of making any person, corporation, or other entity a party to any action in which he or it has not been named, served, or added as such in accordance with the Alaska Rules of Civil Procedure.

Pre-Trial Order No. 1 at 2. Class Plaintiffs argue that the CCAC was made separately applicable to each of the 15 pending actions by inclusion of their short titles and

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[20] Exhibit 4 to Class Plaintiffs' Motion to Remand (Clerk's Docket No. 2048).

[21] ASA and Tygert, plus the other Trust Plaintiffs, made a subsequent attempt to be certified as a Conservation Trust Class. That motion generated the Reply which resulted in removal.

[22] Exhibit 3 to Class Plaintiffs' Motion to Remand (Clerk's Docket No. 2048).

docket numbers in its caption and by repeating the relevant docket number in the paragraphs naming the plaintiffs.

The Class Plaintiffs cited several cases for the proposition that the filing of a consolidated complaint does not merge multiple actions into one. The cases cited do stand for separate cases not being merged upon consolidation, but none of those cases involved consolidating class actions. All of the cases involved individual cases consolidated for pretrial purposes. Furthermore, in each of those decisions the consolidated complaints were specifically authorized, if not actually ordered, by the court to aid the administration of consolidated litigation. *Katz v. Realty Equities Corporation,* 521 F.2d 1354, 1358 (2nd Cir. 1975) ("I will order a single consolidated complaint for pretrial purposes . . . without prejudice to the use of the individual complaints as they stand now at a consolidated trial . . . ."); *In re Wirebound Boxes Antitrust Litigation,* 128 F.R.D. 262, 263 (D. Minn. 1989) ("Management Order 2, 128 F.R.D. 256, permitted plaintiffs to amend their complaints or to file a consolidated complaint . . . ."); and *In re Equity Funding Corporation of America Securities Litigation,* 416 F. Supp. 161, 175 (C.D. Cal. 1976) ("[T]he Court ordered the filing of the First Amended Unified and Consolidated Complaint in this litigation."). There is no indication that Judge Shortell ordered, authorized, or even encouraged the filing of the CCAC to aid the administration of the case.

From all appearances the Class Plaintiffs joined the various class actions into one class action complaint on their own initiative. If the Class Plaintiffs had intended to join the claims, a voluntary consolidated class action complaint listing all affected class action cases is the way to have accomplished that. Pre-Trial Order No. 1 only protects the individual nature of consolidated cases where the parties are not named or added to another action. The CCAC named the plaintiffs from the 15 listed class actions as class representatives for the 5 classes proposed

in the CCAC. The CCAC did not include any provision preserving the separate status of the 15 listed class actions. Fifteen separate class actions could not be transformed into 5 proposed classes without the claims being joined.[23]

The Eyak Native Village v. Exxon, Case No. A91-568, included two cases which were not listed in the CCAC. Those cases were *Kodiak Island Borough v. Exxon Corporation,* No. 3KO-89-264, and *Wisner v. Exxon Corporation,* No. 3KO-89-265, which were class actions that were consolidated through a different consolidated class action complaint (*Kodiak/Wisner* complaint).[24] A joint motion was made in state court for class certification of the classes proposed in the CCAC and the *Kodiak/Wisner* complaint. The resulting Alaska Native Class, Commercial Fishing Class, Area Business Class and Property Owner Class were drawn from both the CCAC and the *Kodiak/Wisner* complaint. The *Kodiak/Wisner* claims necessarily were joined with the claims of the CCAC in order to produce the certified classes.

Since the court has concluded that the claims of the Class Plaintiffs were joined with those of the Trust Plaintiffs (other than National Wildlife Federation, Natural Resources Defense Council, and Wildlife Federation of Alaska), the court must now consider the issue of whether the Trust Plaintiffs' claim was "separate and independent" from the claims of the Class Plaintiffs. The court's tentative view was that the claims of the Class Plaintiffs were separate and independent from the Trust Plaintiffs' claim

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[23] The remaining three Trust Plaintiffs (Zenas Zeine, Joe Klouda and Bill Simmons) were added to the CCAC by the Stipulation (Exhibit 5 to Class Plaintiffs' Motion to Remand (Clerk's Docket No. 2048)). The ambiguous language of the Stipulation does not affect the court's conclusion regarding the joining of the claims in the CCAC.

[24] Exhibit 6 to Class Plaintiffs' Motion to Remand (Clerk's Docket No. 2048).

for purposes of 28 U.S.C. § 1441(c).[25] Oral argument did not change the court's conclusion on this issue.

The test for separate and independent claims was articulated in *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 14 (1951):

> [W]here there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c).

The commentary on the 1990 revision of § 1441 made the following observation:

> Perhaps the best measure of what "a separate and independent claim" is under the *Finn* test—and it remains the measure (in this respect the language of subdivision (c) is not changed by the 1990 amendment)—can be best determined by applying a kind of double-recovery test. If the claim is such that the plaintiff, recovering judgment and satisfaction against one defendant, could not be allowed to recover from another, the plaintiff has in essence only a single "claim" for § 1441(c) purposes.

Commentary on 1990 Revision, 28 U.S.C.A. § 1441.

The cases are divided in determining separate and independent claims where multiple plaintiffs are involved. Defendants argue that the majority of the cases hold that claims of different plaintiffs are separate and independent of each other, even if those claims arise out of the same transaction or event, unless those claims are jointly held, which is not the situation here. *Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 523 F.2d 433, 438 (6th Cir. 1975) ("[E]ach plaintiff could have sued upon his claim alone without joinder of the other, and the claims did not arise from a 'single wrong' of defendant." The controversy involved former employees and the defendant's profit sharing plan.); *Northside Iron & Metal Co.*

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[25] Notice of Oral Argument (Clerk's Docket No. 2391).

v. Dobson & Johnson, Inc., 480 F.2d 798, 801 (5th Cir. 1973) (Subcontractors engaged to supply labor and materials for construction of warehouse sued two defendants over financing arrangement; "Each of the eight plaintiffs had a separate and independent claim against defendants, which could have been sued upon alone without joinder the other plaintiffs."); *Jong v. General Motors Corp.*, 359 F. Supp. 223, 226 (N.D. Cal. 1973) (Personal injuries action resulting from automobile accident; "Where several plaintiffs join in a personal injuries action because of a common question of law or fact, the claims against the defendant are separate and independent within the meaning of Sec. 1441(c).").

The Class Plaintiffs argue that their claims are not separate and independent from the claims of the Trust Plaintiffs because all claims in the *Exxon Valdez* litigation arise out of a single wrong—the oil spill. *Ford v. Murphy Oil U.S.A., Inc.*, 750 F. Supp. 766, 771 (E.D. La. 1990) (Class action brought to recover for damages caused by pollutants emitted from defendants' plants; held that pollution constituted a series of interlocked transactions and created a single wrong); and *Schwartz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 424 F. Supp. 672, 674 (N.D. Cal. 1976) (Class action to recover forfeited pension benefits; "Merely because each plaintiff [in the class action] seeks a separate judgment against defendant, the gravamen of the action is not changed. It is defendant Merrill Lynch's alleged common wrong to all plaintiffs which is the substance of the instant suit.").

The single wrong test of *Finn* was developed for the circumstances of that case, which was a single plaintiff against three defendants. It does not make good sense to broadly apply the single wrong test to multiple plaintiffs unless those plaintiffs jointly hold their claim, because each plaintiff could otherwise proceed by separate suit.

> One purpose of subdivision (c) [of § 1441] was to permit a defendant to lift the entirety of a state-court

> litigation from the state court into the federal court based on the presence of at least one claim that could have invoked federal jurisdiction by itself. . . .
>
> Another purpose of the subdivision was to avoid piecemeal litigation by permitting the federal court to address and dispose of, on the merits, all of the claims asserted, at least when the others had some kind of logical relationship to the claim that acted as the federal touchstone.

Commentary on 1990 Revision, 28 U.S.C.A. § 1441. In this case, there are multiple classes rather than multiple individual plaintiffs, but the logic is the same.

Since the court has determined that the claims were joined and were "separate and independent," removal pursuant to 28 U.S.C. § 1441(c) was appropriate. Therefore, the court does not need to reach defendants' alternative argument that removal was proper pursuant to the court's supplemental jurisdiction under 28 U.S.C. § 1367 (a).

Class Plaintiffs strenuously urged the court to exercise its discretion under 28 U.S.C. § 1441(c) to remand the class claims to state court "because their center of gravity clearly is in the Superior Court." [26] The court declines to so exercise its discretion. The Alyeska defendants have removed almost all of the cases from state court. In addition, this court has jurisdiction over the Trans-Alaska Pipeline Liability Fund appeals. At this time, the "center of gravity" is in this court.

Class Plaintiffs' motion to remand Case No. A91-568 is denied.

Dated at Anchorage, Alaska this 3 day of June, 1992.

/s/ H. Russel Holland
United States District Judge

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[26] Class Plaintiffs' Reply Memorandum in Support of Motion to Remand at 2 (Clerk's Docket No. 2124).

APPENDIX C

[Filed Jul 13, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-35274

D.C. No. CV-89-00095-HRH

EYAK NATIVE VILLAGE, *et al.*,
Plaintiffs-Appellants,

v.

EXXON CORPORATION, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Alaska

ORDER

Before: CHOY, HUG, and LEAVY, Circuit Judges.

The panel, as constituted in the above case, has voted to deny appellants' petition for rehearing and appellees' petition for partial rehearing, filed June 10, 1994. Judges Hug and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Choy has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for partial rehearing are DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 93-35852

ALASKA SPORT FISHING ASSOCIATION; ALLEN TIGERT; JOSEPH KLOUDA; WILLIAM E. SIMMONS; ZENAS "ED" ZEINE,
Plaintiffs-Appellants,

v.

EXXON CORPORATION, *et al.*,
Defendants-Appellees.

Argued and Submitted July 13, 1994
Filed August 23, 1994

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Chief Judge, Presiding

Before: Alfred T. Goodwin, Dorothy W. Nelson, and Cynthia Holcomb Hall, Circuit Judges.

PER CURIAM:

Alaska Sportfishing Association and four individual sportfishers (hereinafter "plaintiffs" or "sportfishers") appeal the dismissal of their class action complaint against

Exxon Corporation, *et al.*, seeking damages for loss of use and enjoyment of natural resources resulting from the 1989 Exxon Valdez oil spill. The district court held that the doctrine of *res judicata* barred the sportfishers from pursuing public loss of use claims because a Consent Decree entered into by the state of Alaska, the United States government, and Exxon had settled all such public claims. The court also dismissed the plaintiffs' claims on the ground that they had failed to allege private, individual injuries and thus, had failed to state a claim for relief. We affirm.

I.

Plaintiffs filed this action in June 1989 in Alaska Superior Court on behalf of a class of an estimated 130,000 recreational sportfishers who used Prince William Sound and other areas affected by the Exxon Valdez oil spill. The action sought injunctive relief and monetary damages "to provide for an environmental mitigation and monitoring fund." *Alaska Sportfishing Ass'n v. Alyeska Pipeline Serv.*, No. 3AN-89-5188 (Alaska Super. Ct. 1989). The complaint asserted a variety of causes of action, including negligence, nuisance, and violation of the state statute imposing strict liability for release of hazardous substances, Alaska Stat. § 46.03.822 *et seq.*

The sportfishers' action was later consolidated with a similar one filed by the National Wildlife Federation (NWF) and several other environmental groups (hereinafter "conservation trust plaintiffs"), who also sought to establish a conservation fund to remedy ecosystem damage caused by the spill. *National Wildlife Fed. v. Exxon Corp.*, No. 3AN89-6957 (Alaska Super. Ct. 1989). Exxon subsequently removed this case and the other consolidated state court actions to federal court.[1]

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[1] As the basis for its removal petition, Exxon alleged that the complaints represented a collateral attack on a federal court judgment. We recently upheld the district court's removal decision in

In March 1991, the United States and the state of Alaska (hereinafter "the governments") also filed suit against Exxon in their capacities as "trustees for the public" under § 311(f) of the Clean Water Act (CWA), 33 U.S.C. § 1321(f)(5), and § 107(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. § 9607(f)(1). *United States v. Exxon Corp.*, No. A91-082 (D. Alaska 1991); *State of Alaska v. Exxon Corp.*, No. A91-083 (D. Alaska 1991). The governments sought damages for restoration of the environment and compensation for lost public uses of natural resources.

The governments subsequently entered into a settlement agreement and consent decree with Exxon (hereinafter "Consent Decree"), which the district court approved in October 1991. In the decree, Exxon agreed to pay the governments at least $900 million (and possibly an additional $100 million) for natural resource and other damages. In return, the governments released Exxon, and provided covenants not to sue, "with respect to any and all civil claims," including all claims for natural resource damages. Consent Decree at 3, ¶¶ 8, 13, 17, 18. Exxon agreed to pay for "natural resource damage," which is defined as:

> compensatory and remedial relief recoverable by the Governments in their capacity as trustees of Natural Resources on behalf of the public for injury to, destruction of, or loss of any and all Natural Resources . . . whether under the Clean Water Act, . . . the Trans-Alaska Pipeline Authorization Act, . . ., or any federal or state statute or maritime or common law relating to the environment, including (1) cost of damage assessment, (2) compensation for loss, injury . . . loss of use value, non-use value, option value, amenity value, bequest value, existence value,

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Eyak Native Village v. Exxon Corp., 25 F.3d 773 (9th Cir. 1994). The *Alaska Sportfishing Association* was among the plaintiffs in *Eyak Native Village.*

> consumer surplus, economic rent, or any similar value of Natural Resources.

Consent Decree at ¶ 6(d) (emphasis added). In 1992, Exxon moved for summary judgment against the sportfishers and the NWF plaintiffs, arguing that the Consent Decree precluded any additional natural resource damages or other relief regarding lost public uses of natural resources. The district court granted Exxon's motion, ruling that: (1) the conservation trust plaintiffs were in privity with the governments in entering into the Consent Decree; and (2) the doctrine of *res judicata* precluded further claims for public relief. Dist. Ct. Order No. 125 (Jan. 19, 1993).

Because the sportfishers' complaint asserted "individual, private claims for loss of use of natural resources," the court gave them an opportunity to amend their complaint "to better allege their uniquely private claims." Dist. Ct. Order No. 125, at 12. Plaintiffs filed an amended class action in February 1993; however, the court found that it failed to allege private claims and dismissed it.[2] Plaintiffs appealed.

II

The first issue is whether the governments of the United States and Alaska, acting as trustees for the public under the CWA and CERCLA, have authority to recover for all lost-use damages caused by the oil spill. Plaintiffs contend that under regulations promulgated by the Department of Interior (DOI) under CERCLA,[3] trustees can recover

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[2] In its ruling, the district court explained: "The sport fishermen do not allege that the spill caused harm to their boats, fishing tackle, or other equipment. The sport fishermen do not allege that they incurred expenses because a specific fishing or camping trip had to be cancelled. . . . The court is convinced that the sport fishermen were unable to allege private claims because these plaintiffs suffered no private injury." Dist. Ct. Order No. 146, at 6, 15 (July 8, 1993).

[3] The regulations, entitled "Natural Resource Damage Assessments" (NRDA), are codified at 43 C.F.R. §§ 11.10-11.93 (1987).

only for "residual" resource injury, and thus cannot recover damages for public loss of use and enjoyment that occurs prior to "recovery," or cleanup. They argue that because government trustees are unauthorized to recover for pre-cleanup, lost-use damages, they should be allowed, as members of the sportfishing public, to recover for such damages. For example, they argue that "[t]he sport fisher, if he or she has a legally cognizable claim, has a distinct claim for loss of use of the injured beach and water before and while they were being cleaned." Appellant's Br. at 16.[4]

However, plaintiffs' argument relies on a strained and hypertechnical reading of the DOI regulations that is inconsistent with the statutes, the policy underlying them, their legislative history, and the relevant case law. See H.R. No. 253, 99th Cong., 1st Sess., pt. 4, at 50 (1985) (noting that trustees may seek a "total amount of damages [that] may include . . . the value of all the lost uses of the damaged resources . . . from the time of the release up to the time of restoration.") (emphasis added); *Ohio v. United States Dep't of the Interior*, 880 F.2d 432, 454 & n. 34 (D.C. Cir. 1989) (damages contemplated by CERCLA "will normally include restoration costs at a minimum, plus interim lost-use value in appropriate cases." (emphasis added). Even the DOI regulations themselves, when read in their entirety, demonstrtate that the government trustees are entitled to recover for all lost-

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In support of their argument, plaintiffs specifically cite 43 C.F.R. §§ 11.10, 11.15(A)(1)(ii), and 11.84(c)(2).

[4] Put into monetary terms, plaintiffs point out that cleanup in the Exxon Valdez spill occurred between 1989 to 1991, and Exxon's experts measured damages for recreational loss in sport fishing, pleasure boating, hiking/viewing and sport hunting at $3.8 million for 1989. Appellant's Br. at 20. If response/cleanup was completed by 1990, as Exxon claims, then "that is $3.8 million the governments could not pursue [in natural resource damages] and these plaintiffs can." *Id.* They also note that their own experts measured the damages between $19.7 million and $43.1 million. *Id.* at 20-21.

use damages on behalf of the public, from the time of any release until restoration. See 43 C.F.R. §§ 11.81(b), 11.14(gg), 11.15(a)(1)(ii) (trustee damages "may include any diminution of use values . . . occurring during the recovery period," which extends from the time of the release until full restoration).

Moreover, if we were to accept plaintiffs' argument, the result would be to severely limit the amount of damages government trustees could recover on behalf of the public in future environmental disasters. Given the restorative purposes behind the CWA and CERCLA, it simply makes no sense to reserve a portion of lost-use damages for recovery by private parties. Unlike trustees, private parties are not bound to use recovered sums for the restoration of natural resources, or the acquisition of equivalent resources. See CWA § 311(f)(5), 33 U.S.C. § 1321 (f)(5). Finally, plaintiffs apparently miss the point that lost-use damages incurred by the public prior to cleanup are damages that, in a layman's terms, remain on the debit side of the ledger after cleanup, and are in fact, unredressed damages for which the trustees may recover. See also Dist. Ct. Order 153, at 6 ("What plaintiffs ignore is that the residual injury would be the lost use values themselves.").

III.

Plaintiffs next contend that the district court erred in dismissing their complaint under the doctrine of *res judicata*. The court held that the sport fishermen may not assert lost recreational use claims on behalf of the public because such claims were already resolved in the Exxon settlement and Consent Decree. Dist. Ct. Order No. 125, at 15. We review the district court's ruling *de novo*, *E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1287 (9th Cir. 1992), and we affirm.

In order for a judgment in a prior suit to create a *res judicata* bar of a subsequent suit, the second suit must involve the "same parties or their privies based on the

same cause of action." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n. 5 (1979); *accord Peck v. Commissioner,* 904 F.2d 525, 527 n. 3 (9th Cir. 1990) (citing *Parklane*).

A. Privity of Parties

The district court concluded that the plaintiffs were privies of the governments under the parens patriae doctrine. Dist. Ct. Order No. 125, at 16-17. This ruling was not in error. State governments may act in their parens patriae capacity as representatives for all their citizens in a suit to recover damages for injury to a sovereign interest. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 607 (1982). A state has a sovereign interest in natural resources within its boundaries. *Maine v. M/V Tamano,* 357 F. Supp. 1097, 1099-1100 (D. Me. 1973). Under the parens patriae doctrine, "a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens." *Environmental Defense Fund, Inc. v. Higginson,* 631 F.2d 738, 740 (D.C. Cir. 1979). There is a presumption that the state will adequately represent the position of its citizens. *United States v. Olin Corp.,* 606 F. Supp. 1301, 1305 (N.D. Ala. 1985).

Here, the Consent Decree specifically provides that the governments were acting in all capacities for their citizens. See Consent Decree, at ¶¶ 2-3. Thus, the sportfishers here, as members of the public, were "parties" to the federal suit within the meaning of *res judicata. See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 692 n. 32 (1979) (citing *Tacoma v. Taxpayers,* 357 U.S. 320, 340-41 (1958)).

B. Identity of Issues

For *res judicata* to operate, there must also be a substantial identity between the issues in controversy in both

suits. *Stasky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1467 (10th Cir. 1993). Plaintiffs argue that the cause of action it advances for pre-cleanup lost uses was not at issue in the suits filed by the state of Alaska or the United States government. With respect to the pre-cleanup loss of use, they argue that "there is no 'close relationship' or substantial identity of interest or issues, between the governments and plaintiffs necessary to create privity." Appellant's Br. at 23.

However, as discussed above, government trustees do, in fact, have authority to recover for lost-use damages from the time of the oil spill to cleanup and restoration. Those are the same damages plaintiffs seek here. The Consent Decree expressly provided that damages for lost public use were covered by the decree. Thus, plaintiffs' argument that they are not barred from recovering pre-cleanup, lost-use damages must fail.

Plaintiffs next argue that the district court erred in concluding that the only claims that survive the Consent Decree were "uniquely private" tort claims. They contend that dismissal of their complaint was improper because they could state a cause of action under both the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1655 ("TAPAA"), and under Alaska's statute imposing strict liability for the release of hazardous substances, Alaska Stat. § 46.03.822 et seq.[5] However, plaintiffs' arguments fail for the same reason their argument under CWA and CERCLA failed: the United States and the state of Alaska, acting as government trustees, have

[5] TAPAA provides a cause of action against the owner or operator of a vessel and the Trans-Alaska Liability Fund, a fund administered by the holders of the trans-Alaska pipeline right-of-way, for spills of oil related to the pipeline. The law makes these parties strictly liable for "all damages . . . sustained by any person." 43 U.S.C. § 1653(c). Damages include loss of use of natural resources. 43 C.F.R. § 29.1(e)(5) (1992). The Alaska strict liability statute covering hazardous substances includes a similar damage provision. Alaska Stat. § 46.03.824-26.

already recovered for the very same damages plaintiffs now seek here. The Consent Decree expressly released Exxon from "any and all civil claims" that the governments brought or could have brought against Exxon under TAPAA or state law. Consent Decree, ¶¶ 6(d), 13. Thus, under the doctrine of *res judicata,* plaintiffs are barred from asserting such claims in a second suit.[6]

IV.

The governments of Alaska and the United States have already recovered damages on behalf of the public for the public's loss of use and enjoyment of natural resources caused by the tragic Exxon Valdez oil spill in Prince William Sound. Because plaintiffs were in privity with these governments, as members of the public, and because plaintiffs seek to recover for the very same damages the governments have recovered for, plaintiffs' claims are barred by *res judicata.* For these reasons, the district court judgment is

AFFIRMED.

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[6] The proposition that individuals cannot recover damages for harm not distinct from the harm suffered by the public at large is consistent with the legislative history behind CERCLA. See 126 Cong. Rec. 27,084 (Sept. 24, 1980); *Ohio,* 880 F.2d at 451 (noting that Congress eliminated from the final version of CERCLA provisions that would have allowed claims by private parties to recover public lost-use values).

Supreme Court, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

No. 94-650

In The Supreme Court of the United States

October Term, 1994

Eyak Native Village, *et al.*,
Petitioners,

v.

Exxon Corporation, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX E TO PETITION FOR A WRIT OF CERTIORARI

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October 1994

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APPENDIX E

ADDITIONAL PLAINTIFFS WHO WERE PARTIES IN THE COURT OF APPEALS

DANIEL R. ADAMS, MARY BETH ALBER, DUANE E. ALLEN, DANIEL ALLEY, MARY ANN ALLEY, STEVE ALLEY, JR., STEVEN H. ALLEY, ARCTIC MARITIME, INC., LEO P. BEDNARIK, DANIEL C. BEISHLINE, BETTY LEE, INC., PATRICK L. BURDEN, TIM D. CABANA, CAMELOT LTD, INC., RONALD G. CAMERON, MINICA D. CAULFIELD, MICHAEL A. CLEMENS, GEORGE CLOUSTON, DAN COISMAN, COLD WATER HARVESTERS, INC., TEAL COPELAND, DENIS P. COX, WILMA COX, WILLIAM M. CURRIE, IRA DAVIS, CLAYTON DAWSON, DAY FISHERIES, INC., EDWARD P. DAY, DEBRA DEE, INC., HELEN L. DENTON, PEDRO DENTON, TERRY DENUPTIIS, DAVID I. DICKERSON, MATTHEW D. DICKERSON, PETER DOLAN, JOSEPH M. DRAGSETH, DREAMBOAT ANNIE, INC., DAVID K. EDENS, EDENS FISHERIES, INC., FOMA EFIMOV, ROBERT J. ("TUT") ELDRIDGE, KEN E. ERICKSON, EVANICK, INC., BART EVICH, RICHARD FEENSTRA, LUBA FEFLOV, TRAVIS GARR D, JEANNIE GILMAN, SHAWN M. GILMAN, GARY L. GINN, VLADIMAR GOSTEVSKYH, DAWN M. HADDOCK, RONALD A. HAMES, RALPH W. HATCH, ROBERT L. HAYNES, FLOYD MICHAEL HEIMBUCH, JAMBRO, INC., THOMAS JAMES, SEAN JOHNSON, ANTHONY L. JONES, JOHN S. KELLEY, TIMOTHY J. KEOHANE, KEN KILBREATH, TERRANCE L. KILBREATH, KUKAK, INC., GLEN E. LANKARD, SR., DAVID C. LARSON, ROBERT D. LEBOVIC, EVERETT J. LINDHOLM, FRED LOVE, INC., FREDERIC S. LOVE, D. JAY LUCAS, JOHN P. MALLORY, JARON K. MAW, JEMES E. McCRACKEN, MARK McKNIGHT, RONALD MEECHAN, PHILLIP H. MOSS, MUKLUK FISHERIES, INC., MEGHAN S. MULLINS, MATTHEW P. NAKKEN, STANLEY J. NELSON, CHARLES R. OLSON, MARIAN OLSON, DALE A. OMERNICK, THOMAS PARKER, MARTIN M. PARSONS, JONATHAN B. PERRY, CLYDE PIGNOLET, WILLIAM C. PONTIUS, Q AND S ENTERPRISES, INC., DAVID REUTOV, VERNON F. ROACH, ANDY SANAROV, SCROUNGER TOO, INC., SEA DIAMOND, INC. DIRK SHARLAND, JAMES L. SIVITS, IGNATEI SNEGRIEV, SPECULATOR, INC., PATRICIA K. STUART, STEVEN M. STUART, JERRY D. THOMPSON, STEVE TOOMEY, SCOTT R. TRESSLER, THOMAS B. TRESSLER, CARL VAN VALKENBERG, RAY G. WADSWORTH, WILLIAM B. WALKER, RICKY R. WIK, JANE S. WILKES, JAMES C. WILSON, CLARK T. WINNE, SONJA MARIE MARTIN YOUNG, DAVID M. ADAMS, ROBERT C. CLUCAS, GEORGE CONNER, ESTATE OF JOSEPH COOK, PETER DENTICE, JAMES M. FEJES. TOM A. GORDON. MARK D. HALPIN. KENNETH J. HALPIN,

JR., RODGER (BUD) HARRIS, CARIG C. HARRISON, CHARLES E. HUGHES, LANCE HUGHES, MICHELLE M. HUGHES, PETER D. GOELDNER, HENRY KROLL, II, CHRISTOPHER LITTLE, MARY JOE McELROY, KATY M. (SHERIDAN) McELROY, PATRICK J. McELROY, ROBERT E. MERCHANT, TIMOTHY J. MOORE, MARGARET H. MOORE, KIMBERLY D. MOORE, WALTER S. PAGE, DOUGLAS E. PARISH, RUSSEL P. PARKS, RALPH J. PETTERSON, ROBERT TOWNE, MARIE A. ELVSAAS, TOM REDMOND, LOU SMITH, JUNE THIELE, CARL THIELE, SR., PAMELA THIELE, TALMADEE ADAMS, VINCENT ARBUCCI, WILLIAM G. AZAR, ROBERT L. BELL, JR., RODNEY BUCKMEIER (ALSO IN A92-180), MAUREEN CHAPMAN, CHRIS A. GARCIA, DELORES GARCIA, CHRIS A. GARCIA, GAIL HALPIN, KENNETH HALPIN, SR., STEPHEN HANSEN, SR., MACHELLE HAYNES (ALSO IN A92-180), HANS KUEHNE (ALSO IN A92-180), THEO MATTHEWS, JR., HENRY A. MILETTE, THOMAS MOORE, FRANCIS MULLEN, ROSS NJAA, BARBARA NJAA, CATHY LASHER, JOSHUA UNKIE, GILBERT PITKANEN, MIKE RAINWATER, THOMAS REDMOND, SONJA REDMOND, BRIAN SHANNON, HARRY SINZ AND JERRY WYDRA (ALSO IN A92-197).

LOYD JAY WHITTEKER, DAVID ROGOTZKE, DARRELYNN CORESON, DALE CORESON, TERRY CORESON, TOM CORESON, DENNIE CORESON, RYAN WATERER, TAMI WATERER, KEVIN WALKER, JEANNE WALKER, FRED L. ALLEN, LOUIS ANDERSON, ANDREA M. ANDERSON, FRAN B. ANDERSON, NEWELL K. ANDERSON, SONYA B. ANDERSON, VIOLA ASP, FAITH L. BARNES, KEN BARNES, JASON BARNES, TERESA BARNES, NICK BORODKIN, SOPHIA BORODKIN, FRED BRIZGALOFF, ROSE ANN BRIZGALOFF, KATHRYN J. BRUCE, CHRIS BELGARDE, ANN BURCH, PATRICK BARNES, JR., ANN CAMBEL, JOHN D. CAMPBELL, LINDA CLEMENTE, JULIA F. DEMOTT, ALEC DONALDSON, SUE DONALDSON, JOHN W. ELISOVSKY, WALTER ELISOSKY, ASHLEY L. FOX, MARVIN E. FOX, TIMA V. FOX, WESLEY E. FOX, HENRY L. FRAZIER, ROBERT J. GRAHAM, WILLIAM J. HANSEN, VICTOR HOTTINGER, LIZ HUNT, JEANNE JAMES, BRIAN JOHANNESSEN, DAVID JOHANNESSEN, SUANNE JOHANNESSEN, AVIS KEMPKOFF, DEAN KRAMER, BOB LADD, ROASLIE MANELY, ANN MORRIS, HARRY MORRIS, JEANNE NELSON, IRIS O'BRIEN, JERRY O'BRIEN, JERRY O'BRIEN, JR., PATRICK C. PAUL, DAN E. RANNEY, SHARON L. RANNEY, MOLLY N. RICE, LARRY SANDERS, ALFRED SASKA, CHARLOTTE L. SMITH, WILLIAM L. SMITH, FRED TIEDEMAN, LLOYD TIEDEMAN, MIKE TIEDEMAN, NATASHA TIEDEMAN, NICK TIEDEMAN, ONIKA

TIEDEMAN, VIOLA TIEDEMAN, MARE TOTEMOFF, JOHN S. VLASOFF, DELL WICHAM, ARTHUR W. WOODS, IRENE WOODS, HOME HARBOR SEAFOODS, INC., AFOGNAK NATIVE CORP., INC., RICHARD KELLEY, MARLA JEAN ADKINS, MIKE TOTEMOFF, JOHN ASP, SAM MEHELICH, MARIE HERMAN-MEHELICH, REGION 37 ISLAND BOATMEN'S UNION, TERRY MAST IBU REG. DIR., ALASKA FISHERMAN'S UNION, MARK COLES PRES. AFU, JOHN FOGES, FRED GALICINAO, MIKE VAN HOLLEBEKE, CATHY SMITH, AVELINE R. LUNA, BARBARA BROWN, CHRISTINE LINDERMANN, RICK ARNOLD, JOEY NERI SALVADOR ASPURIAS, SCOTT HULBERT, BRIAN GILLIS, ROBERT LOVE, JAMIE HALLADAY, VINCENT LABED, ART HUDDLESTON, ROXANNE OLIVEROS, MARCELO RAMBAOA, IVAN C. REUTOV, LOUIS ALBER, NINE ALBER, EDWARD VLASSOFF, CLYDE W. WOODS, JR., JOY LANDALUCE, LUIS LANDALUCE, HOWARD M. BYINGTON, MIKE FLESHANCKY, JEFF JOHANNESSEN, WILLIAM D. JOHANNESSEN, SR., WILLIAM D. JOHANNESSEN, JR., SUE JOHANNESSEN, RICHARD SEPTIEN, PATRICK O'NEILL, MILDRED FOX, TINA V. FOX, MARTIN E. FOX, ALLEN FOX., CYNTHIA FOX, ERVING SMITH, JEFFREY DAVIS, RUSSELL SHAW, VASILY REUTOV, IRADION MARTUSHEV, HARLAN P. BAILEY, DELAINE BECK, FRANK CANADY, ROBERT CLUCAS, LEONARDO D'ORIO, SCOTT DAVIS, DENNIS DEAVER, ERNEST DEMOSKI, TOM DEMYAN, KEVIN DUFFY, JERRY EIDEM, HELEN FOSTER, JAMES HARA, THOMAS HAROMON, RANDALL HOUGHTON, THOMAS HUNDORF, CHARLES G. KEIN, HELEN C. KEIM, PALMER LIE, WILLY LIE, MIKE MAHAN, TONY MARDESICH, DAVID MURPHY, MATT OLSEN, WALTER PAGE, EDWARD SORENSON, JOHN STRONGCVETICH, HARVEY THOMPSON, PETER THOMPSON, VIRGINIA TORNES, HARLEY TOFTE, PAUL TRAXINGER, HERBERT UPTON, III, JOSEPH UTRUP, THOMAS WALKER, JAMES WHITE, HEATHER WILEY, CHRIS SONGER, DONALD HALLSTEAD, DONALE E. HALLSTEAD, KAREN CHAPPELL, BRIAN SCOTT REID, THE COOPER RIVER FISHERMEN'S COOPERATIVE, AN ALASKA CORP., MICHAEL D. MAXWELL, SANDY L. MAXWELL, JAMES AGUIAR, JEFFREY AGUIAR, PATRICK G. BARNES, E.L. CHESHIER, GERALD EKLUND, JERRY McCUTCHEON, GERALD A. SANGER, NATT STEVENS, TOM LAKOSH, PERRY SALMONSON, ROBERT E. MAXWELL, JR., CYNTHIA ANN MAXWELL, TERRY BRAY, WARREN HUPPI, JANICE STAFFORD, CHRISTOPHER WHEELER, GARY T. BRUMLEY, GARY PETTINGILL, ROSE REYES, KODIAK REGIONAL AQUACULTURE ASSOCIATION, DEBORAH RHOADS, MARTIN PARSONS, ANTON

SANAROV, TIMON L. PHILLIPS, BUD BANTA, JOANN BANTA, NORTHLAND FISHERIES, INC., EARL B. WEISE, TRACY ESTES, NICHOLAS TANAPE, ARTURO MORALES OLAVARRIETA, ROBERT A. KEAN, ELIZABETH A. KEAN, STEPHEN W. NOEY, AVI J. FRIEDMAN, BILL V. MAGALLONES, RICHARD C. POWELL, LINDA D. POWELL, LEONARD CHARLIAGA, JOSEPH A. ROSS, BRIAN BUNDERSON, DONNA L. McCUBBINS, D/B/A/ SAMER-I AND ASSOCIATES, LAWRENCE McCUBBINS D/B/A/ SAMER-I AND ASSOCIATES, BRIAN TUENGE, SCURVEY CREEK FISHERY ENHANCEMENT INC., SANDRA J. IRELAND, HOMER K. IRELAND, ALASKAN GOURMET, INC., CHRIS TANAPE, LAURIE M. REDINGTON, RICHARD JOHNSON, TIM CVAR, GEORGE MICHAEL DALE, DAN R. BURCH, GEORGE E. MORRIS, H.B. PROVIDENCE MARITIME GROUP, TRIDENT MARITIME INC., WALRUS FISHERIES, LTD., GREGORY W. MEYER, SYLVIA R. LANGE, WILBER W. RABER, LESLIE RABER, DOWIE FERGUSON D/G/A COOPER RIVER EXPRESS, QUINN SELITSCH, SIMON AMOLODICH, TOM URE, DAN FERRIN, LEONARD T. KELLEY, GRANT THOMPSON, DOUGLAS LATTA, JAN LATTA, PATRICIA D. DAVIDSEN, JIM DEMOTT, ELIZABETH SCHWANTES, ANTHONY ROBERTS, GRACE ROBERTS, JACK SILVA, JANICE SIVITS, ARVO TOMRDLE, LISA TOMRDLE, THOMAS TOMRDLE, GORDON ADKOV, DAVID P. AERS, ASTAFEI AFONIN, ASTUBLI AFONIN, MAKISM AFONIN, MIHAIL A. AFONIN, SIMON AFONIN, SERGY AFONIN, STEVE ALA, RICHARD ALBA, ED ALLEN, ROBIN ALLEN, JOANNE ALEXANDER, MIKE ALEXANDER, DARLENE ANAHONAK, EPHIM ANAHONAK, MERLIN M. ANAHONAK, MICKEY ANAHONAK, PETER ANAHONAK, HOLLY ANDERSON, MICHAEL ANDERSON, PHILLIP ANDERSON, IGNATY ANDREEFF (DECEASED, BY PERSONAL REP USTINA ANDREEFF), USTINA ANDREEFF, RICHARD AUSTIN (DECEASED, BY PERSONAL REP RICHARD AUSTIN), PATSY AUSTIN, RICHARD B. AUSTIN, YEFIM BAGHDANOFF (DECASED BY PERSONAL REP EKATERINA BAGHDANOFF), EKATERINA BAGHDANOFF, RONALD D. BAEES, ARTEMON BASARGIN, ARTEMON BASARGIN, DMITRE BASARGIN, EVGENY V. BASARGIN, FEDOSIA BASARGIN, GEORGI D. BASARGIN, IGNATY BASARGIN, IVAN S. BASARGIN, MIKITA BASARGIN, VASILY V. BASARGIN, VONIFONTI BASARGIN, KCLINTON J. BASSETT, BRANDLEY S. BAXTER, WARREN BEACHY, ROY BEAVER, DAVE BECK, RAY BELLAMY, RANDY BECKER, REBECCA BELLAMY, WILLIAM BLACK, GARLAND E. BLANCHARD, JIM BLUE, MARK BODNOV, STEVE BODNOV, BERNARD BOOTE, PAUL BORU, UVO BORU, WALTER BOVICH,

KEN BOZINOFF, BEN BOZINOFF, PAT BROWN, ANDREW H. BRUNNER, JENNIFER K. BRUNNER, JOSEPH R. BRUNNER, KEIN M. BRUNNER, PERRY S. BUCHANEN, THOMAS BUCHANEN, PHILLIP BUMALA, EFIM BURKOFF, DORIS BANANA, JEFF J. CABANA, LARRY CABANA, LEROY W. CABANA, LEROY L. CABANA, LORI CABANA, GEORGI CAM, PRIFILE CAM, ROB CARLSON, DARREN CARR, LAURENE R. CARLTON, CHAD CARPENTER, ALTERT (AL RAY) CAROOLL, JANET KEATING CARROLL, DALE CAUFIELD, DALE SPENCE CHORMAN, BARTON CHOW, MICHAEL A. CLARK, MARK A. CLEMENS, JAMES M. COBB, CRAIG COGGINS, TIM COHLBERT, WALDO COOK, ROBERT M. COOPER, RON COPENHAVER, BRIAN G. COUCH, MELISSA COUCH, MITCHELL P. CRANE, BARRY CUNDIFF, KEVIN DAHLGREEN, PATRICK J. DAIGLE, DONALD DAVIS, DENNIS DECKER, KENNETH DELMOMPF, MAX DEVANEY, GARY DOLES, DAVID DRISCOLL, MIKITA EFIMOV, IVAN EGOROFF, PETER EGOROFF, DANIEL EIDMEN, JUSTIN EIDMEN, KDORENE ELESHANSKY, MIKE ELESHANSKY, CLINT ELLYSON, PAUL ENEBOE, JR., JAMES ENGLEBRETCH, MARK J. ENGLERTH, LAZAR EROFEEF, DONALD ESSEX, JANET ESSEX, MARK EVRICE, BRAD FAULKNER, ALEXEY FEFELOV, DNNIE FEFELOV, EDESY FEFELOV, FEODOR FEFELOV, KEN FEFELOV, DONDRATY FEFELOV, NIKITA FEFELOV, PAUL FEFELOV, PETE P. FEFELOV, SIMEN FEFELOV, ROBERT FENEX, ROBERT J. FENEX, JR., ROBY FENEX, DONALD E. FLYNN, HARRY FORQUER, GEORGE FRAZIER, DAWN FRY, MICHAEL J. FULLFORD, HENRY GAIN, KEITH GAIN, WALT GARROD, RANDY GLOVER, VASILII V. GORDEEV, GRIGORY GOSTEVSKYH, SEVASTEAN GOSTEVSKYH, IVAN GOSTEVSKYH, KARL GOSTENSKYH, TIM A. GREENE, DAN GREGG, EXENIA GREGORIEFF, LEE ANN GREGORIEFF, BARRETT J. GRIBBLE, RON J. GRIBBLE, SHIRLEY K. GIBBLE, LOIS GWALTNEY, BEVERLY HALL, DONALD HALL, LARRY HALL, LUCK J. HALL, LIONEL HALLETT, SHAWN HANSEN, JERRY J. HANSON, CORRINE HEIDEMAN, EMMIT F. HEIDEMAN, EMIT F. HEIDEMAN, JR., HAAKON E. HEERSINK, HEINRICH R. HEERSINK, JOSEPH HEERSINK, PAUL HEIMBUCH, JAMES ROBERT HEINZEN, MARK HEENE, FRANK R. HETRICK, JR., KATHLEEN H. HINKLE, GARY HOLLIER, DEL HOPTOWIT, KELLY ANN McALLISTER HOSTETLER, LES HOSTETLER, CHRIS HOUGH (A MINOR, BY HIS MOTHER SHILA HOUGH), SHAWNA HOUGH, SHILA HOUGH, STEVE HULL, WESLEY HUMBYRD, JEFF HUNTSMAN, WARREN HUPPI, EFIM IVANOV, GRIGORY IVANOV, IRINIA IVANOV, LAVRO IVANOV, NESTER IVANOV, TIMOFEI IVANOV,

LARRY W. JACKSON, MARK W. JACOBS, THOMAS JAMES, VERN E. JAMISON, RALPH JAMISON, JETOKE INTERATNIONAL, BRENT JOHNSON, CYRUS JOHNSON, RAEY ANDERSON JOHNSON, CRAIG JOLLY, ED C. JOLLY, CHARLES JONES, AFONACIY KALUGIN, ALEXY A. KALUGIN, ALEX P. KALUGIN, ALEX V. KALUGIN, ANISIM KALUGIN, AURAM KALUGIN, CORNILY V. KALUGIN, PETR KALUGIN, PHIL V. KALUGIN, SIAVA KALUGIN, TIMOFEY KALUGIN, FEDOT KANAVOLAT, EKU KANSANA, PATRICK KAUFMAN, STEFEN KAYA, ALAN KELLY, JAY KELLY, GRACIE KENDALL, CLOVIS H. KINGSLEY, PAUL D. KLOSTER, JAMES KNOWLTEN, ANANI A. KOJIN, IVAN KOJIN, DORIS KOMPKOFF, EPHIM KOMPKOFF, SR., FRED M. KOMPKOFF, JR., JACK KOMPKOFF, SR. KENNETH KOMPKOFF, AKATY KONEV, IVAN KONEV, GERMAN (GARY) KRASKOV, KORNILY KROKOF, ALEXANDER KUZMIN, ALEXEI A. KUZMIN, ARSENY KUZMIN, ARTEM KUZMIN, BORIS KUZMIN, DARIA KUZMIN, EROS KUZMIN, EVDOKIA KUZMIN, FADEY KUZMIN, FEODOR A. KUZMIN, FEDOT KUZMIN, FRED KUZMIN, GREGORY KUZMIN, ILYA KUZMIN, KLADVIA KUZMIN, NIKITA F. KUZMIN, NIKITA Z. KUZMIN, NIKOLAI Z. KUZMIN, PAVEL KUZMIN, PAVEL KUZMIN, PETER E. KUZMIN, SERGI KUZMIN, VASILY V. KUZMIN, VASILY Z. KUZMIN, ZAHARY KUZMIN, GAVRIIL S. KUZNETSOV, JOHN KVASNIKOFF, NATLIE KVASNIKOFF, SARJUS J. KVASNIKOFF, WALLY KVASNIKOFF, KORNILY KVOKOF, SCOTT KYKE, TODD LAFRIENERE, PETER LARIONOV, AMBER LATHROP, BREW LATHROP, LAWRENCE LATHROP, TARA LATHROP, ROBERT E. LAVIGUERUR, MARCILEE LAWSON, DONALD O. LEACH, GLENN L. LENT, KEVIN V. LENT, ROBBIN LEVENHAGEN, JUNE LEWIS, RONNIE LEWIS, CARL LINDSTED, STEVE LIONS, JR., MICHAEL P. LOCKWOOD, MICHELLE E. LOCKWOOD, SUSAN H. LOCKWOOD, JERRY MAHONEY, DALE MALCHOFF, DAVID MALCHOFF, MARY MALCHOFF, DAVE MALCHOFF, IOIL MARTISHEV, IOSIF MARTISHEV, IVAN MARTISHEV, NICK MARTISHEV, TROFIM MARTICHEV, VASILY MARTISHEV, ZAR MARTISHEV, ANDRON F. MARTUSHEFF, ELISEY MARTUSHEFF, KALEX MARTUSHEV, ANATOLI MARTUSHEV, ANDREY K. MARTUSHEV, ANDRIE P. MARTUSHEV, ANISIFOR (TONY) MARTUSHEV, DOMNIN MARTUSHEV, EFRONSINA MARTUSHEV, ELENA MARTUSHEV, FEOKTIST (FRANK) MARTUSHEV, FRED MARTUSHEV, GEORGE MARTUSHEV, IRADION (RON) MARTUSHEV, IVAN A. MARTUSHEV, IVAN MARTUSHEV, NIKOLAI G. MARTUSHEV, NIKOLAI K. MARTUSHEV, NIKOLAI MARTUSHEV, NICK MARTUSHEV, PETR

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JOHNATHAN EDWARDS, JOHN EFTA, LEONARD EFTA, FEDORA ENCELWSKI, RANDOLPH ERNST, KENNETH ESS, RHEA S. AND KENNETH L. EVANS AND UNDER THEM -- JULIE A. EVANS-TAYLOR AND MATTHEW W. EVANS, JAMES EVENSON, THOR EVENSON, CHRISTOPHER EVERY, GARY EVERY, IVAN E. AND MARILYN EVERY AND UNDER THEM ROMAYNE ZULKAN, SANDRA EVERY, CHARLES R. FISHER, KRISTEN EVERY, DAVID HAINES, JR., AND DANIEL W. ZULKANYCZ, WILLIAM EVERY, THEODORE M. FARNSWORTH, VITO FERRANTE, BRENT FINDLEY, KEITH FINDLEY, DANIEL FLYNN, DAVID FLYNN, HOWARD D. FLYNN, RODNEY K. FORSBERG, MARK ALLEN FORTUNE, JOHN FOSTER, BRUC FOSTER, SR., CARLOS FREEMAN, LARS FROSTAD AND UNDER H IM GENE ANN & SARAH A. FROSTAD, DANIEL FROULA, BRIAN AND LISA GABRIEL, CHRISTOPHER M. GABRIEL, BRUCE GABRYS, JASON GARCIA, BOB CARNAND, RONALD CARRANT AND UNDER HIM KENNETH MOORE, SHEILA M. GARRANT, RACHEL ROGERS, VANCE VANDEVERE AND ROY GARRANT, CLARK GARRISON, DAN W. GARROUTTE, GARY D. GARROUTTE, LARRY GENTLES, JIM GIBSON, FERREL GINES, JOHN GINSBURG, SIDENY A. GIVENS, MARVIN GOGGIA, GEORGE H. GORDON, DANNY D. GRAHAM, WILLIAM Q. GRANNUM AND UNDER HIM DIANE M., JEFFREY GRANNUM AND ROBERT GRANNUM, STEPHEN GRAVELLE, JERRY L. GREEN, SR., KENNETH GREENFIELD, KENNETH C. AND EMILIE GRIMES, APUL GROESSE, III, JACK GRONHOLDT, WILLIAM F. GUNDERSON, JR., RICHARD GUNLOGSON, KENNETH HAAKENSON, RONALD M. HAAKENSON, HERMAN HAGGREN, JOSEPH MICHAEL HAGGREN, DANIEL HAKKINEN, GENE HALEY, LOINEL AND JOSEE HALLETT, ESTATE OF EDWARD HANKIN, CAROL H. HANZEN, HOWARD HANSEN, STEPHEN E. HANSEN, RJ. DONALD S. HANSON, THOMAS HANSON, BRUCE HARBENSKI, ROGER (BUD) HARRIS, ROBERT G. HARTLEY, ROBERT HARVEY, DANIEL HASTINGS, JACK R. HATTEN, JERRY L. HATTEN, NELSON HAUTANEN, DAVID A. HAYERTZ, DON L. HEGWER, LARRY HEMENOVER, CHARLES GRANT HENDERSON, GEORGE D. HERMON, JOHN B. HERRICK, PAMELA HERSHBERGER, CHRIS HEUKER, MICHAEL B. HEUKER, TIM HEUKER, ARTHUR HILTON, STEVEN G. HOFFMAN, KEVIN HOGAN, LARRY HOLLAND, GARYAND ANGELA HOLLIER, JOHN W. HOLMAN, WILLIAM HOLT, OLIVER AND JOYCE HONEA WENDELL AND UNDER THEM VERN KORNSTAD AND PATRICIA GLAZE, BRADY HORNE, HOWELL H. H OWARD, CHARLES HUDSON AND UNDER HIM SCOTT HUDSON, ERIK HUEBSCH, JOHN HUEY, JACK HUGHES, STANELY

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LUDVICK, SR., GEORGE LUNDQUIST, DANIEL MAHAN, MARK E. MAHAN, TERRY MAHAN, JOSEPH MALATESTA, JR., ALVIN MALONE, EUGENE MANGIARDI, JOHN (BO) MANELY, SHERMAN MANLEY, EMI J. MARCELLI, LEON MARCINKOWSKI AND UNDER HIM JULIE MARCINKOWSKI AND JEANETTE PHILLPS, DNAIEL M. MARTIN, DAVID MARTIN, JOHN MARTIN, ELLMER WILLIAM MATHIESON, LARRY AND CHERYL MATSON AND UNDER THEM EGAN ASKAY, RONALD R. MAW, TIMOTHY McCAMBLY, JOHN E. McCARTHY, TROY McCOLLUM, JOHN D. McCOMBS, MIKE McDONALD, DALE R. McGAHAN, MERRILL MYRON McGAHAN AND UNDER HIM BRAD CASON, RCHARD C. McGAHAN, JR., RICHARD McGAHAN, SR., JAMES D. McGREE, MICHAEL B. McGUIRE AND UNDER HIM JAMES ARROWSMITH AND KEVIN F. HARDING, TIMOTHY McKEIRNAN, DARWIN L. McLEOD, WILLIAM McLEOD, HARLEY McMAHAN, ROBERT L. McMILLEN, RONALD J. MEEHAN, JAMES P. MEESIS, JOSEPH H. MEGARGEL, JOE MEIER, JOSEPH MEIER, COSMO MERCURIO, LES MEREDITH, BRIAN A. MILLER, MAJORIE L. MILLER AND UNDER HER JOYCE & CARY SUMMERS, RICHARD MILLETT, KRISTINE MOERLEIN AND UNDER HER KEITH BEELER AND DOROTHEA TAYLOR AND JOHN ANDERSON, MONTE D. MOIR, THOMAS E. MONROE, JUDITH R. MOORE, RALPH MILLEDGE MORRIS, EILEEN MULLEN, MARTIN MULLIN, JOHN P. MUNNS, JEFF MURRAY, JERE MURRAY, RUFUS LYNN MURRAY, RICHARD AND MOLLY MUSGROVE, THOMAS MUSGROVE, GREG MUSSMAN, LEONARD MUZSEK, BARRY MYERS, CLIFFORD MYERS, TERRY A. MYERS, EARL G. MYERS, JR., MIKE NAKADA, DAVID E. NASH, PAUL NASH, GREGORY M. NELIGH, GLADE NELSON, WANDA NICKEL, GEORGE NIEMI, SUSAN FLORA NIEMI, DANIEL M. NIEMI, JR., JOHN D. NOBLE, MARTIN NORMAN, GEORGE NYCE AND UNDER HIM ROBERTA NYCE AND ROBERT BOIES, ANDREW J. O'NEIL, WALTER OLDFORD, RICHARD C. OLDHAM, DALE OLSGARD, DEAN OSMAR AND UNDER HIM NEVA, JEFF, TIM, JOCELYN OSMAR MILTON SCHWAGERM, NANCY RICHAR, STEVE MULLEN, SUE FEJES-GEIERMANN, MACHELLE HAYNES AND ANNY HUHNDORF, JOHN OSTERVOLD, LEO R. OSTLING, STEPHEN H. OSTLING, MATTHEW J. PANCRATZ, RUSSELL A. PARKINSON, DAVID PARNOW AND UNDER HIM DARRELL MISNER, DAVID PAUL, ARTHUR G. PEDERSEN, RAY J. PEDERSEN, EDWARD AND LEANN PEDERSON, GREGORY R. PERKINS, GIAMBATTISTRA PERONE, RICHARD J. PERSON AND UNDER HIM JAMES R., LILLIAN, JULIA AND RICHARD E. PERSON, GARY PESCHEL, CHRISTINE PETERS AND

UNDER HER DALLAS MOULTRIE, WAYNE PETERSON, ARNOLD PHILLIPS, HANS H. PINNOW, EDWARD PLEVKA, JR., LARRY PONN, MORRIS L. PORTER, ROBERT (WILLY) PORTER, J.C. POWELL, II, LARY POWERS, MARK POWERS, SANDRA POWRS, KEVIN B. PRENTICE, DAVID QUASHNICK, RICHARD QUASHNICK, CRAIG RALSTON, LESLIE RANGUETTE, MICHAEL RANGUETTE, GERALYNN AND JEFF RANSOM AND UNDER THEM ALLEN FINNESETH AND KEVIN HODGSON, JOHN RATE, DANIEL REGAN, JR., MICHELLE REICHERT, ARTHUR D. REITH, ROSEMARY RENNER AND UNDER HER JOHN STANDEFER AND DARREL W. RENNER, MIHEY V. REUTOV, JERRY G. ROBERT, JOHN T. AND HELEN J. ROBERTS, PAUL J. AND LINDA M. ROCHON, RAY RODGERS AND UNDER HIM KENNY RODGERS, JERRY ROGERSS, JOE ROMANI, JR., LOUIS L. ROMANI, RALPH ROOT, MARK ROTH, DENNIS RUDEK, HAROLD RUDOLPH, JAMES RUSSELL, MICHAEL L. RUSSELL, RONALD E. RUSSELLL, RONALD R. RUST, CLARENCE RYHERD AND UNDER HIM JAMES M. RYHERD, MICHAEL W., DANNY, AND HOWARD C. RYHERD, THEODORE SADLER, JR., JIM SATATHITE, DAVID C. SCHEER AND UNDER HIM DEBORAH NAKAKA, AND EVELYN NOERR AND JEFFREY TRUHN, ROBERT L. AND LEDA SCHMIDT AND UNDER THEM BOB BARNES, LEDA BARNES, ARMIN AND DANIEL SCHMIDT, ROGER SCHMIDT, JERRY AND MARCIA SCHOOLEY, TIM SCHORR AND UNDER HIM JOSEPH A. KLINGE & JAMES A. D, CHARLES R. AND CALLESTRA SEATER, KRISTI SEATER, LEE SEATER AND UNDER HER KAREN, ASTRID, AND FRED SEATER, ROBERT SEATER, RONALD J. SEATER, CHARLES SEE, ROBERT SEGAL, EDWARD SEILER, GARY A. SEIMS, WILEY SEWARD, PAUL A. SHADURA, II (AND UNDER HIM VANCE E. LUND AND ALEX P. AND VIRGINIA A. SHADURA), ELLEN S. SHETTLESWORTH (AND UNDER HER KAREN S. GLEASON), JAMES SHOWALTER, BRENT SHROY, PETER SHURAVLOFF, DEWIGHT SIMPSON, CLYDE AND DOROTHEA SMITH (AND UNDER THEM ROCKWELL SMITH), EDGAR L. SMITH, GREG SMITH, JIM R. SMITH, WILLIAM R. SMITH, JEFF D. SNYDER, STEVEN L. SOLIE, DAVID M. SORENSEN, RAMON DREW SPARLIN, JR., RAMON DREW SPARLIN, SR., JOSEPH SPINALE, ALONA SQUIRES, DAVID S. SQUIRES, PHILIP SQUIRES, JIM ST. PETER, WILLIAM STANLEY, JEAN STASSEL (AND UNDER HER FRED, JOAN AND PAUL STASSEL), TRUDY S. WEBB AND SUE STEINBACK (AND UNDER THEM WILLIAM R. PENNING AND ROBERT D. TOLL), GARRY STENSLAND, KRISTEN STENSLAND, LAWRENCE A. STENSLAND, RONALD L. STENSLAND, WALTER A. STENSLAND, JR., DANIEL L.

STENSLAND, JR., DANIEL J. STENSLAND, SR., SCOTT STEVENSON, WILEY AND KATHY STEWART, RIDGLEY STIER, RUBEN SUBLETT, WILLIAM B. SULLIVAN, JR., VAN B. SWAN, LOUIS SWANSON, ALAN W. TAKALO, JASON TAURIANINEN, RICHARD TAURIANINEN, ALEX TAYLOR (AND UNDER HIM NANCY TAYLOR, LINDA JOHNSTON AND RENA PETERSON), LARRY R. TELEN, LONNIE TEMPLE, ROSALIE TEPP, THOMAS TEMPLE, ROBERT A. TEPP, MARGARET M. TESTARMATA, JACK THOMAS, ERIC THOMPSON, HARVEY AND AGNES THOMPSON, JOSEPH L. THOMPSON, TOK THOMPSON, DAVID THORNTON, HARRY TIBBS, ARNE K. TIKKA AND UNDER HIM NATALIE TIKKA, LELAND D. TODD, RAYMOND M. TOSTE, FRANK B. TOWNSEND, GEORGE TOWNSEND, PAUL TRAXINGER, SANDRA TRAXINGER, MIKE TRUJILLO SR. AND UNDER HIM VICKI L. TRUJILLO, AND MICHAEL PAUL, GERRY S. TULIOS, STEVE TVENSTRUP, PAUL AND SANDRA UMLAUF AND UNDER THEM ANDREW UMLAUF, DAVID VALAER, L. DYER VAN DEVERE, CHRIS K. VAN RYZIN, STEVE VANEK, RICK VANN, DEBORAH VEERHUSEN, DALE WADDELL II, DAVID A. WADE, JOHN L. WADE, RICHARD A. WADE, MARK WAGNER, DIANA WALKER AND UNDER HER JOSEPH F. AND LARRY E. WALKER, GREGORY WALKER, ERO S. WALLI, ROBERT A. WARNER, ROBERT WATSON, STEVEN WEBB, ROBERT E. WEGDAHL, ROCHNE WEGDAHL, JAMES R. WELLS, JASON R. WELLS, GERALD R. WESTERHOLM, DOUG E. WESTERLUND, TONY B. WESTERN, CARROLL WETZEL, CLARK WHITNEY, DAVID AND JO ANN WICHERS, JOANNE B. WIDMAN, JOSEPH G. WIDMAN, HAROLD WIK, SHANE WIK, LEROY J. WIKA, ROBERT V. WILLIAMS AND UNDER HIM ORAN HUCKABAY AND THOMAS ROLLMAN, WAYNE D. WILSON SR., ROBERT WITMAN, ELWYN D. WOOD, KENNETH WOOD, NORMAN E. WOOD, SCOTT WOOD, SETH WRIGHT, MIKEAL WULLGER, JERRY WYDRA, JOHN ZAPPA AND ALASKA FISH PRODUCERS, INC., ALLIED PROCESSING, INC., COOK INLET AQUACULTURE ASSOC., D & G ENTERPRISES, INC., KEENER PACKING COMPANY, INC., NORTHLAND FRESH INC., OCEAN PREMIUM MARKETING, INC., SEA-NIK FOODS/MARUTSUBO-SUISAN COMPANY, LTD., KENNETH DUFFUS, ROBERT BERNARD, RICHARD BRANSHAW, GREGORY J. ZAPAKYNIUK, WILLIAM M. MASSENGALE, MERLE AAKER, MARTIN ANDERSON, ANDREW ALLEN, GEORGE ALLEN, JACK BABIC, DANIEL BILDERBACK, WILLIAM BAILEY, SCOTT BLAKE, PETER BLAKE, JAMES BROWN, GREG BRUMLEY, JOHN BURCH, TED BUTLER, CARL BURTON JR., GLENN BORODKIN, JOHN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

EYAK NATIVE VILLAGE, *et al.*,
Petitioners,

v.

EXXON CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Based on the decision of the Court of Appeals and the record below, the issues actually raised by this petition are:

(1) Whether the courts below erred in concluding that, by voluntarily filing a single class action complaint and jointly advocating "omnibus" classes, the present petitioners "joined" their claims with those of certain non-petitioning plaintiffs for purposes of 28 U.S.C. § 1441(c).

(2) Whether the present petitioners may be heard to argue that the courts below erred in concluding that, by attempting to attack and seek relief from a Federal Consent Decree in state court, certain non-petitioning plaintiffs raised a federal claim within the removal jurisdiction of the district court.

RULE 29.1 STATEMENT

Respondent Exxon Corporation has no corporate parent, and is the corporate parent of respondent Exxon Shipping Company. Respondent Exxon Corporation has numerous subsidiaries that are not wholly owned, a list of which is given in the attached Appendix pursuant to Supreme Court Rule 29.1.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Exxon Corporation and Exxon Shipping Company (collectively, "Exxon") respectfully submit that the instant petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") should be denied for the reasons shown below.[1]

COUNTERSTATEMENT OF THE CASE

There is no need for Exxon to restate the case at length. As the Court will see, however, a welter of EXXON VALDEZ claims and proceedings are referenced in the opinions below (Pet. App. 1a, 23a).[2] The petition fails to make sufficiently clear the exact identity of the plaintiffs who appealed to the Ninth Circuit and now petition this Court, a matter that should be cleared up at the outset.

---

[1] On August 29, 1994, 47 days after rehearing was denied below, Exxon filed a petition for certiorari styled *Exxon Corp., et al. v. Eyak Native Village, et al.*, No. 94-385, in which Exxon sought review of certain aspects of the Ninth Circuit's judgment below; this Court denied Exxon's petition in No. 94-385 on October 11, 1994. Under this Court's Rule 12.4, the Ninth Circuit plaintiffs-appellants now petitioning in this matter (No. 94-650) were all respondents as to Exxon's petition in No. 94-385. Nonetheless, the Ninth Circuit plaintiffs-appellants waited for 43 days (until October 11, 1994) to present their petition to the Court seeking review of other aspects of the Ninth Circuit's judgment. Unfortunately, that approach will oblige this Court to devote its attention to the same decision of the Ninth Circuit on two separate occasions. Further, Exxon has been obliged to file a petition for rehearing in No. 94-385 and is concurrently filing a cross-petition. The Court may wish to consider whether the petition in No. 94-650 should be considered timely in these circumstances.

[2] This opposition will cite the petition as "Pet. 00," and the appendix thereto as "Pet. App. 00a."

This petition challenges only that portion of the Ninth Circuit decision (Pet. App. 5a-18a) upholding Order No. 80 of the United States District Court for the District of Alaska ("Federal District Court"). In Order No. 80, the Hon. H. Russel Holland denied motions to remand to Alaska Superior Court two cases removed by Exxon -- *Eyak Native Village v. Exxon*, No. A91-568 Civil, and *National Wildlife Federation ("NWF") v. Exxon*, No. A91-567 Civil.

The *NWF* plaintiffs did not appeal to the Ninth Circuit, and hence only the *Eyak* case remains relevant. In *Eyak*, motions to remand were filed separately by (1) the "Trust plaintiffs" and (2) the "Class Action plaintiffs." *See* Pet. App. 24a, 33a. Both motions were denied in Order No. 80, for the reasons summarized below. None of the Trust plaintiffs pursued an appeal to the Ninth Circuit. *See* Pet. 4 n.2, 10-11; Brief for Plaintiffs-Appellants, 9th Cir. No. 93-35274, at 12 n.15 ("The Trust Plaintiffs are not parties to the present appeal"). Thus, the only appellants before the Ninth Circuit and the only petitioners before this Court are the *Eyak* Class Action plaintiffs.

Exxon's *Eyak* removal papers alleged removal jurisdiction alternatively under 28 U.S.C. § 1441(a) and 28 U.S.C. § 1441(c) (1988 & Supp. V 1993). The courts below found it necessary to address the issues only under section 1441(c), which provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed . . . .

Trust Plaintiffs. In Alaska Superior Court, the Trust plaintiffs sought certification of a class to pursue trust-style recovery for natural resources damages, the same type of recovery also being sought at that time in Federal District Court by the State of Alaska in its capacity as natural resources trustee on behalf of the public. *State of Alaska v. Exxon*, No. A91-083 Civil. On October 8, 1991, Judge Holland entered an Agreement and Consent Decree ("Federal Consent Decree" or "Decree") resolving *State of Alaska* and *United States v. Exxon*, No. A91-082 Civil. The Decree provided for Exxon to pay the two Governments at least $900 million to restore and rehabilitate natural resources damaged by the EXXON VALDEZ oil spill. In exchange, the Decree released *all* of both Governments' claims against Exxon, expressly including the State of Alaska's claims as natural resources trustee on behalf of the public. Pet. App. 4a, 11a, 27a n.11.

Notwithstanding entry of the Federal Consent Decree, the Trust plaintiffs sought to persevere with their trust claim in Alaska Superior Court. Exxon filed a notice of removal. Under section 1441(c), Judge Holland upheld Exxon's removal of the Trust plaintiffs' claims because their state-court papers had raised a well-recognized species of federal claim in "attack[ing]" the Federal Consent Decree and "seeking relief from the decree on the basis that it was fraudulently obtained." Pet. App. 7a-8a; *see id.* at 7a-13a; *id.* at 24a-33a. In a subsequent development not mentioned by the petitioners here, Judge Holland rejected the Trust plaintiffs' attack on the Consent Decree in Amended Order No. 125 (dated Jan. 19, 1993). As the petition states, he further granted Exxon's motion for summary judgment against the Trust plaintiffs on grounds of *res judicata*. *See* Amended Order No. 125 (dated Jan. 19, 1993); Order No. 146 (dated July 8, 1993).

As already noted, unlike the Class Action plaintiffs, the Trust plaintiffs did *not* appeal to the Ninth Circuit from denial of their remand motion in Order No. 80. However, in addressing issues raised by the Class Action plaintiffs, the Ninth Circuit adopted Judge Holland's findings and conclusions that, under section 1441(c), the Trust plaintiffs' attack on the Federal Consent Decree raised "a separate and independent claim or cause of action within the jurisdiction conferred by [28 U.S.C.] section 1331." *See* Pet. App. 7a-13a.

Class Action Plaintiffs. Under section 1441(c), for reasons elaborated upon below, both lower courts further found that the claims of the Class Action plaintiffs had been "joined" in Alaska Superior Court with those of the Trust plaintiffs into an "entire [removable] case." *See* Pet. App. 13a-18a, 33a-40a. The Class Action plaintiffs appealed unsuccessfully to the Ninth Circuit and now seek this Court's review.

REASONS FOR DENYING THE WRIT

There is no reason whatever for this Court to grant a writ of certiorari in this case. Petitioners' claims of conflict are baseless, and their "questions presented" demonstrably mischaracterize the opinion below. The real issues below are record bound, and they were resolved correctly and consistently by the two courts below. Moreover, several developments post-dating removal counsel strongly against this Court's committing its "scarce judicial resources" to this case. *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

I. CONTRARY TO PETITIONERS' ASSERTIONS, THE CONCLUSION BELOW THAT THEIR CLAIMS WERE "JOINED WITH" THOSE OF THE TRUST PLAINTIFFS PRESENTS NO CONFLICT AND DID NOT REST ON THE MERE FACT OF CONSOLIDATION; THIS RECORD-BOUND ISSUE IS NOT SUITABLE FOR THIS COURT'S REVIEW AND WAS IN ANY EVENT RESOLVED CORRECTLY AND CONSISTENTLY BY THE TWO LOWER COURTS.

The principal claim in the petition (Pet. i, 10-14) is that the Ninth Circuit erred in holding that the concededly non-federal claims of the Class Action plaintiffs (the petitioners here) were "joined with" the federal claims of the Trust plaintiffs into an "entire case" removable under 28 U.S.C. § 1441(c). This "joined with" issue fails to raise a matter worthy of this Court's review. The very purpose of 28 U.S.C. § 1441(c) is to allow the removal of non-federal claims "joined with" federal claims. It is self-evident that the courts below were better positioned than is this Court to immerse themselves in the voluminous state-court pleadings and to decide the record-bound question as to which state-court claims were "joined" into an "entire case." This issue was resolved consistently by two lower courts, and this Court usually eschews record-bound inquiries in such circumstances. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

A. Petitioners Mischaracterize The Decision Below In Asserting That Joinder Was Found Due Merely To Consolidation For Pretrial Purposes And The Filing Of Consolidated Papers.

Attempting to manufacture a question potentially having import beyond this case, petitioners baselessly assert that the decision of the Ninth Circuit will permit "joined with"

removal under section 1441(c) whenever state courts employ routine "case-management procedures" in "complex class action litigation." Pet. 10, 12. Here, petitioners assert, joinder was found merely because the Alaska Superior Court had consolidated all EXXON VALDEZ cases for pretrial purposes and petitioners had filed "consolidated papers" with the Trust plaintiffs. *See* Pet. 10-14.

This position mischaracterizes the record and opinion below, and hence the issue petitioners advocate for review simply is not present in this case. The Ninth Circuit expressly stated that "we have more [here] than consolidation alone." Pet. App. 16a. The dispositive consideration was that the July 17, 1989 Amended and Consolidated Class Action Complaint ("CCAC") obliterated the boundaries between the previously separate complaints, proposing "omnibus" classes (Pet. 4) and intermingling plaintiffs from various predecessor actions as proposed representatives of those proposed classes. The Ninth Circuit stated:

> [T]his is *not* a situation in which the class representatives [merely] joined in a joint motion or discovery action. This is a situation in which a whole new complaint was voluntarily filed, designating five entirely different classes. The representatives of some of the new classes came from several of the prior classes; for example, the proposed representatives for the Commercial Fishing Class came from 12 of the previously separate class actions.

Pet. App. 14a-15a (emphasis added). The Federal District Court likewise emphasized that intermingling (*id.* at 36a-37a) and stated:

> From all appearances the Class Plaintiffs [and Trust plaintiffs] joined the various class actions into one class action complaint on their own initiative. If the Class

> Plaintiffs had intended to join the claims, a voluntary consolidated class action complaint listing all affected class action cases is the way to have accomplished that.

Id. at 36a.

B. The Record-Bound "Joined With" Question Was Correctly And Consistently Resolved By Two Courts Closer To The Issues And Pleadings Than Is This Court.

Once petitioners' mischaracterization of the opinion below is stripped away, there is no conceivable basis for this Court's immersing itself in the "joined with" issue presented by the facts of this particular case. To illustrate, petitioners argue elaborately that the CCAC did not join the claims of the Trust plaintiffs and Class Action plaintiffs named therein, but rather served only to catalog 15 separate cases embraced by the state court's consolidation order (with the Trust plaintiffs allegedly remaining hermetically isolated in one of those 15 supposedly separate cases (*Alaska Sportfishing Ass'n*)). *See* Pet. 4, 10-14. The courts below correctly rejected these strained arguments.

The Federal District Court noted in part that the June 8, 1989 consolidation order in Alaska Superior Court did *not* "order[], authorize[], or even encourage[]" the filing of a consolidated complaint by any of the parties to the various state-court actions. Pet. App. 36a. Rather, named plaintiffs in 15 previously separate class actions took it upon themselves voluntarily to file a single, new complaint, the CCAC. Hence, "[f]rom all appearances," they had joined their claims in a straightforward fashion. *Id.*

Petitioners assert that the CCAC "meticulously reserved the separate identities of the [predecessor] cases, as originally filed." Pet. 10. In fact, the CCAC cannot be squared with this assertion. First, the CCAC expressly made allegations showing that the predecessor complaints had been merged into a single case.[3] Second, the CCAC erased the boundaries between the predecessor cases (1) by proposing only five "omnibus" classes (Pet. 4) where previously there had been 15 proposed class actions of varying dimensions and (2) by intermingling plaintiffs from the various predecessor actions in the proposed classes. In April 1990, plaintiffs in the previously distinct *Wisner* case "joined [the omnibus CCAC class action] motion." *Id.*; *see* Pet. App. 15a, 37a.

These specific considerations (and not the court's order of consolidation or the routine filing of consolidated papers) were what persuaded Judge Holland and the Ninth Circuit that the claims of the Class Action plaintiffs had been "joined with" those of the Trust plaintiffs. The Ninth Circuit stated:

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[3] If 15 separate "cases" retained their separate identities within the CCAC, one would expect the CCAC to include allegations so stating or otherwise attributing some significance to those supposedly separate identities. In fact, however, the CCAC lacks such allegations and instead belies petitioners' present assertions by the repeated use of singular terms such as "this action" and "this case." *See* CCAC ¶¶ 75, 76, 76(a), 76(b), 76(c), 76(d), 76(e), Prayer. Further showing the superseded nature of the predecessor complaints, the CCAC stated: "By virtue of the filing of this Amended and Consolidated Class Action Complaint, Plaintiffs *formerly named* in the captions of the above-listed actions *who no longer appear as named plaintiffs* have not dismissed their claims, either with or without prejudice. Rather, they have elected to preserve and pursue their claims as unnamed members of one or more of the plaintiff classes listed herein." CCAC ¶ 86 (emphasis added).

> The plaintiffs did not seek in the Consolidated Complaint to preserve the individual identity of their former class action complaints. As the district court observed, "Fifteen separate class actions could not be transformed into 5 proposed classes without the claims being joined." The same principle applies to the plaintiffs in the *Wisner* case, who later joined in the consolidated action.

Pet. App. 15a.

This conclusion, reached by both the Federal District Court and the Ninth Circuit, was entirely sensible; indeed, it was compelled. As the Ninth Circuit noted, the very nature of a class action is to serve as "'a multiple joinder device, permitting the litigation, in one single action, of multiple claims involving similar or identical questions of law and fact usually arising from the same set of operative facts.'" Pet. App. 16a (citation omitted). Nowhere do petitioners plausibly explain how, if the predecessor actions remained separate, plaintiffs in different cases could possibly be members -- and proposed representatives -- of the same classes.

Petitioners strain to hypothesize implausible adverse consequences that may occur in complex litigation if the Ninth Circuit's decision is allowed to stand without review. Far worse would be the confusion that will prevail on countless procedural questions, for purposes of 28 U.S.C. § 1441 and otherwise, if the proponents of a voluntarily-filed class action complaint such as the CCAC are later free to claim (when it suits them) that their claims are not "joined" but are instead to be treated as separate claims merely consolidated under Fed. R. Civ. P. 42.

C. The Ninth Circuit's Decision Is Not In Conflict With Any Decision Of Any Other Court.

There is no basis for review in petitioners' assertions of conflict. *See* Pet. 12-14. Most notably, petitioners do not

assert that any other court has held that claims voluntarily joined in a common class action are somehow not "joined" for purposes of section 1441(c). Indeed, the Ninth Circuit decision is not claimed to be in square conflict with any decision of any other court on any topic whatever. Rather, petitioners merely claim a "conflict in principle" with several non-removal cases holding that a court's *order of consolidation* "'does not merge the [consolidated] suits into a single cause . . . or make those who are parties in one suit parties in another.'" Pet. 13-14, quoting *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496-97 (1933). The opinion of the Ninth Circuit is entirely consistent with that principle and with all of petitioners' authorities.[4]

As already shown, it was not the order of consolidation in Alaska Superior Court that was held to join the various claims here, but rather the separate and voluntary acts of the Class Action plaintiffs in commonly pursuing a class action with the Trust plaintiffs. Chaos will result if plaintiffs, having voluntarily joined others in filing a single, new complaint that "[f]rom all appearances" supersedes separate

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[4] Petitioners rely particularly on *Katz v. Realty Equities Corp.*, 521 F.2d 1354, 1358 (2d Cir. 1975), *In re Equity Funding Corp. Securities Litigation*, 416 F. Supp. 161, 176-77 & n.12 (C.D. Cal. 1976), and *In re Wirebound Boxes Antitrust Litigation*, 128 F.R.D. 262, 264 (D. Minn. 1989). *See* Pet. 14. In *Katz* and *Equity Funding Corp.*, the trial court entered an order requiring the filing of a consolidated complaint over the objection of certain defendants. In *Wirebound Boxes*, certain plaintiffs objected that they had not consented to inclusion of their claims within a consolidated complaint filed by other plaintiffs. In each case, the court turned aside the objection to the consolidated complaint on the ground that it had been ordered or would be allowed solely to facilitate pretrial proceedings. Obviously, these cases do not stand for the proposition asserted by plaintiffs -- that any complaint happening to bear the word "consolidated" necessarily fails to join claims first alleged in separate actions. *See* Pet. App. 15a-16a, 36a.

original complaints (Pet. App. 36a), nonetheless may somehow secretly avoid joinder of their claims simply by affixing the word "consolidated" to the new complaint.

II. CONTRARY TO PETITIONERS' ASSERTIONS, THE CONCLUSION BELOW THAT THE CLAIMS OF THE TRUST PLAINTIFFS WERE PROPERLY REMOVED WAS NOT PREMISED ON THE INVOLVEMENT OF A FEDERAL-LAW DEFENSE; THIS RECORD-BOUND ISSUE WAS RESOLVED CORRECTLY AND CONSISTENTLY BY THE COURTS BELOW AND IN ANY EVENT IS NOT APPROPRIATELY RAISED BY THE PRESENT PETITIONERS.

As an afterthought, petitioners -- all of whom are Class Action plaintiffs -- conclusorily assert that the Ninth Circuit erred in "upholding the removability" of the Trust plaintiffs' claims in supposed violation "of the principle that removal cannot be premised on the [involvement] of a federal-law defense." Pet. 15. This second issue -- which petitioners do not even claim has systemic importance -- is even less worthy than the first of this Court's review.

A. Petitioners Again Mischaracterize The Decision Below In Asserting That Removability Of The Trust Plaintiffs' Claims Was Premised On The Involvement Of A Federal-Law Defense.

In asserting that removal jurisdiction was predicated on the involvement of a federal defense, petitioners once again mischaracterize the decision below in an effort to frame a question not actually presented. Both the Federal District Court and the Ninth Circuit were cognizant of the principle that removal jurisdiction ordinarily cannot be based upon involvement of a federal-law defense. *See* Pet. App. 7a-8a, 29a. Accordingly, contrary to petitioners' assertions, both

courts expressly refrained from predicating removability of the Trust plaintiffs' claims upon the involvement of Exxon's defense that the Federal Consent Decree (releasing the State of Alaska's claims as natural resources trustee on behalf of the public) raised a *res judicata* bar against the claims of the Trust plaintiffs. *See id.* 8a, 29a-30a, 32a.

Rather, after an extensive analysis, the Federal District Court found, and the Ninth Circuit agreed, that the Trust plaintiffs' state-court filings affirmatively "requested relief from the consent decree" and

> went beyond responding to an anticipated federal defense when they alleged that the consent decree did not represent full compensation for natural resources because of the State's conflict of interest and breach of fiduciary responsibility.

Pet. App. 30a; *see id.* at 7a-8a, 10a, 12a. It was the involvement of this affirmative attack on the Federal Consent Decree, not the mere involvement of a federal *res judicata* defense, upon which the courts below based their decisions.

B. The Record-Bound Removability Question Was Consistently And Correctly Resolved By The Two Lower Courts.

As with petitioners' first claim, their bid for review collapses when stripped of the mischaracterization of the decision below. The two lower courts canvassed the state-court pleadings carefully and came to the same conclusion -- that they presented an affirmative attack on a federal decree. *See* Pet. App. 8a-12a, 26a-32a. For decades, it has been well-established that an attack on a federal decree raises federal questions and that such questions come within original jurisdiction under section 1331 and hence within

removal jurisdiction under section 1441(c). As summarized by a leading treatise:

> [A]n action to enjoin or otherwise obtain relief from a federal judgment involves the validity of the judgment as a continuing obligation; the substantive principles of the action are federal; and, we believe, [the action] presents a general federal question.
>
> If the independent action is brought in a state court it may be removed to the appropriate federal court on the basis of a general federal question.

7 J. Moore, *Moore's Federal Practice* ¶ 60.38[1], at 60-401 to -402 (2d ed. 1993) (footnotes omitted).[5]

C. It Would Be Inappropriate To Review The Removability Of The Trust Plaintiffs' Claims At The Behest Of The Class Action Plaintiffs.

Furthermore, this case does not present an appropriate vehicle to review the principles upon which the lower courts relied in upholding the removability of the Trust plaintiffs' claims. In the first place, no Trust plaintiff appeared before

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[5] *See, e.g., Finley v. United States*, 490 U.S. 545, 551 (1989); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934); *Royal Ins. Co. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1292 (5th Cir. 1992); *Striff v. Mason*, 849 F.2d 240, 244-45 (6th Cir. 1988); *Amalgamated Sugar Co. v. NL Indus. Inc.*, 825 F.2d 634, 639 (2d Cir.), *cert. denied*, 484 U.S. 992 (1987); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984); *Villareal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976); *Deauville Assocs. Inc. v. Lojoy Corp.*, 181 F.2d 5, 6 (5th Cir.), *cert. denied*, 340 U.S. 905 (1950); *South Dakota Cent. Ry. v. Continental & Commercial Trust & Sav. Bank*, 255 F. 941, 943 (8th Cir.), *cert. denied*, 250 U.S. 642 (1919); *Woods v. Root*, 123 F. 402, 404 (7th Cir. 1903); *First Nat'l Bank v. Society for Sav.*, 80 F. 581, 582 (4th Cir. 1897).

the Ninth Circuit seeking reversal of Order No. 80 (and thus remand to Alaska Superior Court). Thus, there is no basis for this Court actually to overturn Order No. 80 insofar as it relates to the non-appealing Trust plaintiffs.

Assuming that the removability of the Trust plaintiffs' claims is nonetheless considered germane to the overall removal posture of the Class Action plaintiffs, this Court would be ill-served by taking a case in which the Class Action plaintiffs would argue that the non-appealing Trust plaintiffs were not allowed to be "master[s] of [their] claim." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Without the participation of the Trust plaintiffs, debate of this issue would lack the concrete adversity which best assures informed judicial decisionmaking, leaving this Court on treacherous footing in delineating principles for the removal of cases involving attacks on federal decrees.[6]

III. SEVERAL ADDITIONAL CONSIDERATIONS ALSO MILITATE STRONGLY AGAINST GRANTING REVIEW.

In addition to the matters discussed above, there are several other considerations showing that this is not an appropriate case for this Court's discretionary review.

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[6] If the Trust plaintiffs were before this Court, they would be obliged to argue the removability question with the knowledge that positions taken here to defeat removal might inhibit their ability to pursue their claim in state court upon any remand. The Class Action plaintiffs would face no such real-world limitations; they would have every incentive to adopt arguments or make concessions solely to advance their own position, regardless of the impact on the Trust plaintiffs.

First, the Federal District Court and the Ninth Circuit both acknowledged but failed to address Exxon's alternative arguments in support of removal. *See* Pet. App. 8a, 32a. In addition, although not true earlier, there is now complete diversity between the plaintiffs and remaining defendants in the *EXXON VALDEZ* litigation, creating a new basis for retroactive validation of the Federal District Court's jurisdiction. Thus, should review be granted here, this Court would be obliged to address and resolve (or remand for consideration of) the alternative bases that Exxon has argued or will argue in support of removal jurisdiction.[7]

Second, petitioners grudgingly acknowledge (Pet. 7 n.6) that their claims -- together with numerous other claims -- have already proceeded to resolution on the merits (subject to post-trial motions and appeals). Collectively, the *EXXON VALDEZ* litigation before the Federal District Court was of vast magnitude, imposing immense burdens upon the parties and Judge Holland. In this process, Judge Holland applied

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[7] At the time of Exxon's notice of removal (November 20, 1991), several other persons were also defendants in this case (*Eyak*). *See* Pet. App. 25a. The other defendants included residents of the State of Alaska (the state of residence of most plaintiffs). Now, however, all defendants other than Exxon and Captain Joseph Hazelwood have settled with plaintiffs or been voluntarily dismissed. At present, there is complete diversity between the *Eyak* plaintiffs and the remaining defendants. It is well-established that removal jurisdiction (or original jurisdiction) can be established retroactively by the settlement or the voluntary dismissal of defendants. *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 18 n.18 (1951) (in holding that removal was invalid under prior version of 28 U.S.C. § 1441(c) due to lack of complete diversity, this Court noted that jurisdiction could be validated retroactively by dismissal of non-diverse defendant); 7 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1685 (2d ed. 1986).

federal maritime law and rejected the claims of some petitioners in whole or in part on summary judgment. Other claims were tried in Federal District Court in a three-phase jury trial consuming several months of 1994. Petitioners admit that they are bound by the results of the trial while still seeking to renew in state court aspects of their claims rejected by Judge Holland on summary judgment. *See* Pet. 7 n.6.

These are maritime claims concerning a maritime accident, fully cognizable in Federal District Court under 28 U.S.C. § 1333. Hence, Exxon contends that petitioners' voluntary participation in the compensatory damages phase of the trial after the May 27, 1994 decision of the Ninth Circuit constituted a waiver of any right that might otherwise have existed to a remand to state court. In any event, however, this Court should not grant its discretionary writ to advance the quest of these petitioners for a second bite at already-resolved maritime claims, when petitioners can change the result only by persuading the state courts to apply principles other than the federal maritime principles applied by Judge Holland.

CONCLUSION

For all of the foregoing reasons, Exxon respectfully urges this Court to deny the petition for certiorari in this matter. Exxon is concurrently filing a conditional cross-petition seeking review of other aspects of the decision below. Should this petition be granted, Exxon respectfully requests that the Court also grant Exxon's cross-petition.

Respectfully submitted,

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Dated: November 10, 1994

APPENDIX

APPENDIX

Rule 29.1 Statement

165550 Canada Limited
172965 Canada Limited
2849518 Canada Limited
571270 Alberta Limited
590320 Alberta Ltd.
AGA Progas a.s
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Acquifund Resources Limited
Aditivos Orinoco, C. A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Advanced Elastomer Systems Do Brasil Ltda.
Advanced Elastomer Systems Japan Limited
Advanced Elastomer Systems Limited
Advanced Elastomer Systems Marketing Pte. Ltd.
Advanced Elastomer Systems NV/SA
Advanced Elastomer Systems Singapore Pte. Ltd.
Advanced Elastomer Systems, Canada, Inc.
Advanced Elastomer Systems, Inc.
Advanced Elastomer Systems, L.P.
Air Tankdienst Koeln GbR
Aircraft Fuel Supply B. V.
Al-Jubail Petrochemical Company
Alberta Products Pipe Line Ltd.
Alyeska Pipeline Service Company
AquaAir Environmental, Inc.
Aramco Services Company
Asakawa Sekiyu K.K.
Awaji Gas Nenryo Kabushiki Kaisha

Azuma Sekiyu K.K.
B.W.O.C., Inc.
BEB Erdgas und Erdoel GmbH, Hannover
BRIGITTA Erdgas und Erdoel GmbH, Hannover
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K.K.
Bayerische Erdoelleitung G.m.b.H.
Beaverhill Resources Limited
Brickwood Holdings Pty. Ltd.
Bryan Austin Chalk Operating Committee, Inc.
Bryan Woodbine Gathering, Inc.
Canadian Reserve Oil & Gas Ltd.
Cascade Fertilizers (1990) Limited
Castle Peak Power Company Limited
CeraMem Separations, Inc.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Changi Into-Plane Services (Pte) Ltd.
Chuo Sekiyu Hanbai K.K.
Comcor Chemicals Limited
Compagnie Industrielle des Polyethylenes de Normandie, GIE
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oyonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
Copim St. Lawrence Ltd.
Cynthia Gas Gathering Company Limited
DFTG Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daito Gas K.K.
Depot Petrolier du Gresivaudan
Depots Petroliers de la Corse
Depots de Petrole Cotiers

Deudan-Holding GmbH
Deutsche Advanced Elastomer Systems GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Disma S.r.l.
Dixie Pipeline Company
Dunbar Oil Ltd.
E S F Limited
ETD Tankdienst Gesellschaft Duesseldorf GbR
Eagle Kenso K.K.
Eagle Reinsurance Co. Ltd.
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel und Erdgas AG
Emirates National Chemicals Company Ltd.
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.b.H.
Emulsions de Feyzin
Emulsions du Dauphine
Energie Marketing Service GmbH
Enterprise Housing Partners 1992 Limited Partnership
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Erdoel-Raffinerie Deurag-Nerag GmbH
Esso (Overseas) Pension Trust Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Exploration and Production Ireland Limited
Esso Lub'Services

Esso Malaysia Berhad
Esso Raffinage S.A.F.
Esso S.A.F.
Esso Standard Thailand Ltd.
Esso Standard Tunisie S. A.
Esso Technologies et Services (E.T.S.)
Esso Yukong Specialities Ltd.
Etablissements Cloarec
Exxon Asset Funding Company
Exxon Asset Management Company
Exxon Chemical Asset Management Partnership
Exxon Chemical France
Exxon Chemical Paraffins Limited
Exxon Chemical Polymeres SNC
Exxon Mobile Bay Partnership
Exxon de Colombia S.A.
F.T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Fernkaelte Geschaeftsstadt Nord G.b.R.
Flughafen Schwechat Hydranten-Gesellschaft
Fuji Kogyo K.K.
Full Cycle Plastics Pty. Ltd.
G16a (Groep) B.V.
Gasunie Engineering B.V.
Gasunie Warmte/Kracht Emmen B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.

General Sekiyu Overseas, Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane - Lavera
Ges. fur Mineraloelveredlung und Distribution Rhaesa mbH
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Gewerkschaft Kuechenberg Erdgas und Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier de Nantes (G.P.N.)
Groupement Petrolier de Saint-Pierre des Corps (G.P.S.P.C.)
Groupement Petrolier de la Cote d'Azur
Groupement Petrolier du Finistere G.I.E.
Groupement Petrolier du Val-de-Marne (G.P.V.M.)
Groupement d'Exploitation du Depot de Reception de Chennevie
Hambrecht & Quist Environmental Technology
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitungs-G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokkai Sanshi Co., Ltd. (Chemical)
Hokushin Bussan K.K.
Hokuyu Sekiyu K. K.
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation
Hydrant Refuelling System, S.A.

Hydranten-Betriebs-Gesellschaft, G.b.R.
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil (an Ontario General Partnership)
Imperial Oil Limited
Imperial Oil Resources Limited
Imperial Oil Resources N.W.T. Limited
Imperial Oil Resources Ventures Limited
Imperial Oil Resources an Alberta Limited Partnership
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Iranian Oil Participants Limited (Iranian Consortium)
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Jaymo SNC
Jersey Nuclear-Avco Isotopes, Inc.
K. K. Momose Shiojiri Stand
K. K. Toresen
K.K. Aizu General
K.K. Auto
K.K. Daimaru
K.K. Eastern Gas Terminal
K.K. General Sekiyu Hanbaisho
K.K. Genet
K.K. Genetech
K.K. Genex
K.K. Heian Sekiyu
K.K. Kyoei Shosha
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu

K.K. Momose Sekiyu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
KX Industries, L.P.
Kabushiki Kaisha Sankyo Plastics
Kabushiki Kaisha Serubisu
Kai Tak Refuellers Company Limited
Kansai Chuo Sekiyu K.K.
Kanto Kygnus K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kemcor Australia Pty. Ltd.
Kemcor Elastomers Ltd.
Kemcor Olefins Ltd.
Kemcor Plastics Pty. Ltd.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K. K.
Korea Perchem Company Limited
Kosxon Chemical Company Limited
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E.P. Rubber Co., Ltd.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu K. K.
Kygnus Sekiyu Seisei Kabushiki Kaisha

Kygnus Trading Kabushiki Kaisha
Kyushu Eagle K.K.
L-Net East K.K.
L-Net West K.K.
L12A (Groep) B.V.
L12B/L15B (Groep) B.V.
L14 (Groep) B.V.
L15A (Groep) B.V.
L2 (Groep) B.V.
L5a (Groep) B.V.
LEAG Aktiengesellschaft fuer luzernisches Erdoel
Les Docks des Petroles d'Ambes
Liants Routiers de la Vallee de la Loire (LRVL)
Liants Routiers du Gard (L.R.G.)
Lilac Sekiyu Kabushiki Kaisha
Lily Sekiyu K.K.
Lithcon Petroleum International (Bahamas) Inc.
Lithcon Petroleum Taiwan Inc.
Long Beach Oil Development Company
MEGAL FINCO
MEGAL GmbH
Maasvlakte Olie Terminal C.V.
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Malaysian Energy Chemical & Services Sdn Bhd
Manchester Airport Storage and Hydrant Company Limited
McCann Plastics Inc. (Chemical)
McColl-Frontenac Inc.
McColl-Frontenac Petroleum Inc./Petroliere McColl-Frontenac
Meiji Sekiyu K.K.

Mikawa Bussan K.K.
Mitake Unso K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrank
Mode Wheel Property Limited
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Mount Thorley Coal Loading Limited
Multi Tank Card B.V.
Mytex Polymers (General Partnership)
N. V. Nederlandse Gasunie
NAM - K 14 B.V.
NAM - K 15 B.V.
NAM - K 7 B.V.
NAM-K17 B.V.
NAM/CLOMS - K 8/K 11 B.V.
NAM/CLOMS - L 13 B.V.
NAM/MOBIL M9a B.V.
NPC Services, Inc.
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Nanseki Kaihatsu K.K.
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
New Cure, Inc.
Newcastle Coal Shippers Pty. Limited
Nichiei Kogyo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nissei Sekiyu Kabushiki Kaisha

Nogat B.V.
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankte
Noroxo
Northward Developments Ltd.
OSLO Alberta Limited
Office Prive d'Assurances et de Courtages
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oldenburgische Erdoel Gesellschaft G.m.b.H.
Oleoducto de Colombia S.A.
Oleoductos Canarios, S.A.
Osaka General Gas K.K.
Osaka Kygnus K.K.
P. T. Stanvac Indonesia
P.A.C. S.A.R.L. (Pinson-Allegret-Causse)
PIMEC Inc.
Pacesetter Enterprises Limited
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pier Atlantic Limited
Pipe Line Services, Inc.
Plantation Pipe Line Company
Port-Jerome Gaz (P.J. Gaz)
Portland Pipe Line Corporation
Primaeroel GmbH
Prince William Sound Oil Spill Response Corporation
Progas Limited

Projectbureau W/K B.V.
Quadrant Gas Limited
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Regulus Holding (Singapore) Pte. Ltd.
Rheingas Erdgasleitungs-Gesellschaft G.m.b.H.
Rotterdam Antwerpen Pijpleiding (Belgie) N.V.
Rotterdam Antwerpen Pijpleiding C.V.
Rotterdam-Antwerpen Pijpleiding (Nederland) N. V.
Rubiatec Sendirian Berhad
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire Geneve
SEAG Aktiengesellschaft fuer schweizerisches Erdoel
SERAM S.p.A.
SOVEXOIL Oil Field
Saitama Sekiyu Hanbai K.K.
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Senboku Oil Kikoh K.K.
Shehtah Drilling Limited
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K. K.
Shinohara Oil K.K.
Smiley Gas Conservation Limited
Sociedad Nacional de Oleoductos Ltda.
Sociedad de Inversiones Limited
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM

Societe Geomines-Caen
Societe Anonyme Produits Lubrifiants de Madagascar - PROLU
Societe Anonyme de Gestion de Stocks de Securite (SAGESS)
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dech
Societe Esso de Recherches et d'Exploitation Petrolieres
Societe Francaise EXXON CHEMICAL
Societe Havraise de Manutention de Produits Petroliers
Societe Malgache de Raffinage
Societe Paris-Manche
Societe Paris-Niel
Societe Reunionnaise d'Entreposage
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad
Societe d'Exploitation & de Developpement d'Operations Comme
Societe d'Exploitation des Garages Les Stations Tour Eiffel
Societe de Manutention de Carburants Aviation (S. M. C. A.)
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe de la Raffinerie d'Alger
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)

Southern Natural Gas Development Pty. Ltd.
Standard Kaihatsu K.K.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Stansted Fuelling Company Limited
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera
Sueddeutsche Erdgas Transport Gesellschaft mit beschrankter
Sun East (Dublin) Company, Ltd.
Superior Disk Corporation
Syncrude Canada Ltd.
Synergistics Industries (NJ) Inc.
Synergistics Industries (TX) Inc.
Synergistics Industries Limited
TAR-Tankanlage Ruemlang AG
TBN Tanklager-Betriebsgesellschaft Nuernberg mbH
TCA Plastics Inc.
TEAM Terminal B.V.
TFS Turbo Fuel Services GmbH, Hamburg
TGF Tankdienst Gesellschaft Frankfurt G.b.R.
TGM Tankdienst-Gesellschaft Muenchen GbR
TIBA Speditions GmbH
TLS Tanklager Stuttgart GmbH
Taihei Bussan K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Taketsuru Yugyo K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A. G.
Tanklager Taegerschen AG
Tanklager-Gesellschaft Tegel G.b.R.
Tanklagergesellschaft, Koeln-Bonn G.b.R.
Tecnica Quimica Petrolera, S.A. de C.V.

Terminal Petrolier de Bordeaux (T.P.B.)
Thai Aliphatics Company Limited
Thai C-Center Company Limited
Thai Petroleum Pipeline Co., Ltd.
Thyssengas G.m.b.H.
Tohpren Co., Ltd. (Chemical)
7Tojo Gas K.K.
Toko Sekiyu K.K.
Tonen Chemical Nasu Co., Ltd.
Tonen Energy International Corp.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Filare Co. Ltd.
Tonen Film Company Limited
Tonen Kabushiki Kaisha
Tonen Kagaku K.K.
Tonen Properties Inc.
Tonen Sogo Service Co., Ltd.
Tonen System Plaza Kabushiki Kaisha
Tonen System Service Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Tapyrus Company Limited
Tonen Technology K. K.
Tonex Company Limited
Towa Compounding Co., Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Trans-Northern Pipelines Inc.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Transgaz Lavera
Tsurumaru Unyu K.K.
UBAG - Unterflurbetankungsanlage Flughafen Zurich
Ulan Coal Mines Limited

United Industry Development Co., Ltd.
Van Salt Water Disposal Company
Verbundnetz Gas AG
Wako Jushi Kabushiki Kaisha
Warmtepomp Nederland B.V.
Westdeutsche Erdoelleitungs-G.m.b.H.
Westgas G.m.b.H.
Woodbine Marketing Co., Inc.
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Zenon Environmental Systems Inc. (ZESI)

Supreme Court, U.S.
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No. 94-650

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EYAK NATIVE VILLAGE, *et al.*,
Petitioners,
v.
EXXON CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Exxon Respondents' effort to sow confusion in their Brief in Opposition (as well as in their Cross-Petition presenting unrelated questions, No. 94-855) does not diminish the clarity and importance of the discrete questions of law presented by our Petition. These are (1) whether consolidated filings in multi-case class action litigation constitute "joinder" for derivative "entire case" removal under 28 U.S.C. § 1441(c), and (2) whether federal-question removal jurisdiction can be derived by recharacterizing a plaintiff's argument against an anticipated *res judicata* defense as an affirmative challenge to a prior federal judgment.

1. There is no basis for Exxon's repeated assertions that these are "record-bound" issues unsuited to review on

certiorari. Every petition necessarily arises from a record. But there is nothing at all voluminous or obscure about the record materials relevant to this Petition:

(a) As to the first question presented, the Court need review only two paragraphs of the state court's first pretrial order and the basic outlines of the Amended and Consolidated Class Action Complaint, the Class Action Plaintiffs' Motion for Class Certification, and the Class Action Plaintiffs' Reply Memorandum in Support of Motion for Class Certification. The holding below that there was "joinder" of claims into a single "case" raises a straightforward question as to the legal significance of filing such documents on a consolidated basis pursuant to a conventional complex-litigation pretrial order.

(b) As to the second question presented, the Court need review only six pages of the Trust Class Plaintiffs' Reply Brief in Support of a Conservation Trust Class, to determine whether the Court of Appeals erred as a matter of law in holding that it was tantamount to an independent action to set the governmental consent decree aside, rather than simply a response to an anticipated defense that the consent decree would preclude the Trust Class claim.

Neither of the opinions below nor Exxon's Brief in Opposition identifies anything else in the record as in any way material to either of the questions presented by this Petition. And of course Exxon's invocation of the two-court rule is out of place where, as here, there is no issue of fact.[1]

2. None of Exxon's grab-bag of diversionary "additional considerations" has any pertinence to the suitability of these two questions of law for review.

(a) There is no basis for the suggestion (Br. in Opp. 1 n.1) that the Petition is not "timely" because it was not

[1] The Court of Appeals correctly noted that it was reviewing the District Court *de novo* (Pet. App. 8a).

filed earlier as a cross-petition to Exxon's petition seeking review of separate issues arising out of separate removal orders which happened to be reviewed in the same Court of Appeals decision (*Exxon Corp. v. Eyak Native Village*, No. 94-385, denied October 11, 1994, rehearing denied November 28, 1994).[2] We doubt that this would have been a proper cross-petition in view of the separateness of the orders, the cases and the plaintiffs involved.[3] In any event, Rule 13.5 of this Court's rules states very clearly that a cross-petition is always timely (without any requirement of conditionality) if filed within 90 days after the court of appeals judgment, as our Petition was.

(b) Exxon cites no authority for its assertion (Br. in Opp. 13-14) that Petitioners should not be allowed to seek review of the second question because the Trust Plaintiffs did not appeal. Exxon made no such assertion in the Court of Appeals, and that Court rested its decision on a full (though erroneous) analysis of the Trust Plaintiffs' removal posture. It is absurd to suggest that Petitioners lack standing to challenge this essential first premise of the removal of their state-law claims (and those of the classes they represent) from the state court in which they were filed.

(c) There is no significance here in the fact that Exxon has developed additional theories of diversity jurisdiction and waiver unrelated to the questions presented by this Petition (Br. in Opp. 14-16). Exxon has presented those theories to the District Court by a motion seeking to prevent remand to state court of the other cases which the Court of Appeals' decision held were improperly removed. The plaintiffs in those cases have

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[2] Exxon attempts to raise precisely the same issues yet again by its contingent cross-petition (*Exxon Corp. v. Eyak Native Village*, No. 94-855, filed at the same time as its Brief in Opposition). We are filing our opposition to Exxon's cross-petition at the same time as this Reply.

[3] The present Petitioners were thus no more than nominal respondents in No. 94-385. See p. 7 n.6 of our Petition.

opposed Exxon's motion in the District Court on a number of grounds.[4] Even if Exxon's alternative theories of federal jurisdiction were ultimately to succeed, that unlikely occurrence would not detract from the importance of the discrete issues presented by this Petition.

For the foregoing reasons and those previously stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] *Inter alia*, Exxon's diversity theory comes too late under the last clause of 28 U.S.C. § 1446(b), and its waiver theory is negated by plaintiffs' consistent objections to removal jurisdiction and indeed Exxon's own stipulation that those objections were preserved. In the lower courts as well as here, Exxon has let no stone, however tiny, go unturned in its tireless campaign to limit its liability by making the District Court's restrictive rulings on the scope of compensatory damages applicable to as many plaintiffs and class members as possible.